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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS,
v.
THE ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY.
No. 89.

ARGUMENT ON BEHALF OF THE UNITED STATES.

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STATEMENT.

This appeal from the Court of Claims seeks a reversal of the judgment of that court whereby the sole responsibility is placed upon the appellants for a marine collision (or rather a series of allisions) which occurred in the harbor of New Orleans, La., on May 7, 1888, between the steam sternwheel tow-boat *Future City*, having in tow a number of ladened barges, and several United States ships of war which were lying at anchor in the said harbor.

The Congress, waiving the tort, if any, conferred jurisdiction upon the Court of Claims to hear and determine said claim in the following special act approved August 3, 1894 (28 Stats., 219; transcript, p. 5):

> *Be it enacted, etc.*, That the claims of the legal and equitable owners or claimants of the steam

towboat *Future City*, her barges in tow, cargoes thereon, freight, and personal effects contained in them, alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war *Atlanta*, *Galena*, and *Richmond*, in the Mississippi River, at the city of New Orleans, on or about the 7th day of May, 1888, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage hereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war.

The cause came on regularly to be heard and was argued by counsel and was decided by a majority of the court, Peelle, J., dissenting, on March 21, 1898, and is reported in 33 C. Cls. R., p. 251, rendering judgment upon said day in favor of the appellee and against the appellants in the sum of $19,808.85. (Transcript, p. 35.)

On May 5, 1898, the appellants duly filed their application for an appeal to this court from said judgment. (Transcript, p. 36.)

On November 11, 1898, the appellants filed their first motion for a new trial in said cause, under and pursuant to Revised Statutes, section 1088, for the reasons and purposes set forth in said motion, a copy

of which, except the affidavits upon which it was based, is to be found in the Record, at pages 36 to 41.

On December 18, 1899, more than a year after said motion for a new trial had been filed and at a different term of the court from that in which said motion had been made, the court overruled said motion but proceeded to amend the findings of fact theretofore filed on March 21, 1898, by striking out the whole of findings XVII and XXIII and by substituting a new finding in lieu of former Finding XXIII. (Transcript, p. 41.)

On January 23, 1900, the appellants, under and pursuant to the provisions of Revised Statutes, section 1088, filed their second motion for a new trial in said cause for the reasons and objects stated in said motion (a copy of which, omitting the affidavits upon which it was based, is to be found in the record, from pages 41 to 43), and likewise filed their motion to re-form and amend the findings of fact in the particulars set forth in said motion, a mutilated copy of which is contained in pages 43 to 45 of the record.

On May 14, 1900, the court overruled this second motion for a new trial and at the same time withdrew the findings of fact which had been filed and entered on March 21, 1898, as amended on December 18, 1899, and likewise withdrew the opinion which had been pronounced on March 21, 1898, and filed new findings of fact and a new opinion as of said May 14, 1900. (Transcript, p. 45.) No judgment whatever has ever been rendered upon these findings of fact, but the old judgment of March 21, 1898, which was founded upon

a different set of findings of fact and a different opinion was allowed or attempted to be allowed to stand. (Transcript, p. 35.)

The new findings and opinion of the court were not entered *nunc pro tunc*, nor were they entered in lieu of the former findings of fact. They were merely new findings of fact and conclusions of law and a new opinion, filed May 14, 1900, as is clearly shown by the order of the court (transcript, p. 45), as follows:

> THE ST. LOUIS AND MISSISSIPPI Valley Transportation Company
> *v.*
> THE UNITED STATES. } No. 18626.
>
> At a Court of Claims held May 14, 1900, the defendants' motion for a new trial was overruled, the former findings of fact were withdrawn, and new findings of fact and opinions were filed.
>
> BY THE COURT.

It is true that on page 5 of the transcript the clerk of the Court of Claims, in making up the record for this court, begins his statement of the findings of fact with the following remark:

> On the 21st day of March, 1898, the court filed findings of fact and conclusions of law. Subsequently, to-wit, on May 14, 1900, the court filed an order withdrawing its former findings of fact in the case, and filed *amended findings in lieu thereof*, which are as follows:

But this is a mere statement from the clerk, which is hopelessly contradicted by the order of the court

itself found on page 45 of the transcript. The order of the court does not describe the findings of May 14, 1900, as "amended" findings, but as *new* findings. Nor does the court say in its order that the findings of May 14, 1900, are filed "in lieu" of the ones which it had previously filed on March 21, 1898, but, on the contrary, distinctly says that "the former findings of fact were withdrawn and new findings of fact and opinions were filed." The statement of the clerk, therefore, can not be received in contradiction of the order of the court, since the order of the court is in the record and speaks for itself. Indeed, this statement from the clerk is not properly in the record for any purpose, except as a statement of the proceedings of the court in their chronological order.

The only judgment that has ever been rendered in this case was rendered on March 21, 1898, and we have therefore the remarkable spectacle of a judgment upon a special verdict being rendered more than two years before the verdict is found. It is not believed that this was any judgment at all. When on May 21, 1900, the findings of fact and the opinion were withdrawn, the judgment was necessarily destroyed, since there was nothing left upon which to base a judgment; and inasmuch as no judgment has ever been rendered upon the findings of fact filed May 14, 1900, and inasmuch as they were not filed *nunc pro tunc*, it is not believed that any valid judgment exists against the appellant in this case. But inasmuch as a review of the decision of the court below was desired, it became

necessary to perfect this appeal from the only judgment that has ever been rendered. This was duly done on May 21, 1900 (transcript, p. 45), and the case is now presented for review, subject to the objection, upon which we shall insist, that no valid judgment whatever exists against the appellants in this case.

The facts in this case may be briefly stated as follows:

On May 5, 1888, the United States ships of war entered the harbor of New Orleans and came to anchor in the Mississippi River at distances from the western bank varying from 500 to 700 feet. They were anchored one behind the other, at suitable distances, in the following order: The *Richmond*, *Yantic*, *Ossipee*, *Galena*, and *Atlanta*, the *Atlanta* being the ship farthest upstream and being, according to the findings, 600 feet from the western or New Orleans shore. In this position the ships remained at anchor until the collision occurred two days later, during which time neither the harbor master nor any other person made any complaint or objection to their place at anchorage, nor directed them to anchor elsewhere. On May 7, 1888, the steam stern-wheel towboat *Future City*, having in tow eight heavily laden barges filled with grain lashed together in the manner set forth in the diagram on page 23 of the transcript, arrived at a place known as the Elevator, on the Mississippi River, which is the beginning of the harbor of New Orleans and distant about 2 miles from the landing place of the St. Louis and Mississippi Valley

Transportation Company, where said *Future City* was to land her barges. Having arrived at this point said *Future City* began preparations to land her tow 2 miles farther down the stream. The method pursued was to run in close to the New Orleans or western shore of the river and then begin to back so as to extend the head of the tow out in the current, while keeping the stern wheel of the boat in the slack water near the shore, bringing her tow into a flanking position nearly at right angles to the current of the river, her bow and tow extending out into the river at an angle of about 45 degrees, and in this position to float down the river with the current. Having arrived near its landing, the boat would begin to back with all power, throwing the head of the tow to the left, and land with the head of the tow downstream. The *Future City* and tow, in the manner arranged, was 607 feet long and 175 feet broad. The Mississippi River between the points hereafter mentioned is 1,800 feet wide. To execute the maneuver performed by the *Future City* required more than one-third of the entire width of the river all the way from the elevator to the landing stage, a distance of 2 miles or more. While descending the river in the manner described, a steamer known as the *Mabel Comeaux* approached the *Future City* from below, on a journey up the river, and gave one blast of her whistle as a signal to the *Future City* of her intention to keep to the side nearest the city and that the tow must get out of her way.

The signal from the ascending boat was answered by the *Future City*, and accordingly the tow was pushed farther out into the stream so as to allow the *Mabel Comeaux* to pass between the stern of the *Future City* and the New Orleans shore, which was done. While the *Future City* was descending the river as described, and while she was slightly above Jackson street, a sudden rain, accompanied with high wind and thunder, came up, but had subsided by the time the *Future City* reached Celeste street, at which point the shore juts out into the water to some extent, and the river turns. Upon rounding this point of land at Celeste street, still floating downstream with the current, at an angle of about 45 degrees, the pilot of the *Future City* discovered for the first time the United States ships of war lying at anchor in the river as above described. When so discovered the *Atlanta*, which was the first ship upstream, was distant from the *Future City* about 150 yards, and from the New Orleans shore 600 feet. Upon discovering the war-ships at anchor the *Future City* attempted to back, in order to check her headway and straighten up or bring herself and her tow into a position broadside on to the shore. The width of the tow and boat was only 175 feet, and thus could easily have passed between the ships of war and the New Orleans shore if she could have straightened up. She failed, however, in her efforts to do so, and was carried down the stream by the force of the current, and still in a flanking position, so that barge 73, which was the lead barge of her tow

was swept down upon the ram of the *Atlanta*, the barge striking the *Atlanta* on the barge's port side amidships with great force, sinking said barge 73, and thereupon said *Future City* and her barges continued to drift down the stream with the current, being still unable to either check her headway or to straighten up her tow, and the stern of the *Future City* having been swung downstream by the collision of barge 73 with the *Atlanta* was carried down upon the *Galena*, which was lying some 400 feet astern of the *Atlanta*, whereby barge No. 68 was destroyed. The tow then having been broken up, the lines and fastenings of the tow and the rigging of the *Future City* having been parted by said collisions, barge No. 50 broke loose and was carried by the current down upon the *Richmond* and sustained great damage.

The only charge of negligence which is made against the officers in command of the men-of-war in the present findings of fact is as to the place of anchorage. No charge of negligence is made as to the manner in which the ships of war were anchored, nor in any particular other than the place of anchorage. In the original findings of fact it was found that the ships of war were anchored upon a single chain and swung in their berths, and that the collision between barge 68 and the *Galena* was caused by the *Galena* suddenly sheering in toward the New Orleans shore and sinking said barge 68, and this, too, although no such allegation is made in the petition. But upon the motions for new trial it was conclusively proved to the court that this

finding was not only erroneous upon the testimony before the court, but that the fact recited was a physical impossibility, inasmuch as the *Galena* was held steady in her berth by the action of the wind and current and could not possibly have sheered in toward the New Orleans shore. Accordingly, in the findings of fact filed on May 14, 1900, the court totally erased the former finding to this effect, and totally erased that portion of its opinion which charged the *Galena* with the consequences of such negligence. So that the present findings are harmonious with the allegations of the petition, and charge the men-of-war with negligence solely as to the place at which they were anchored. These facts will be exemplified presently when we come to examine the findings of fact; but the statement is sufficient here.

We have, then, a stern-wheel towboat, carrying eight barges, all of which were heavily laden with grain and lashed forward, three upon her starboard and four upon her port bow, forming an unwieldy mass 607 feet long and 175 feet wide, floating down with a 6-mile current, at an angle of 45 degrees, for a distance of 2 miles, occupying more than one-third of the entire width of the river, in the busy, crowded port of New Orleans, having pushed herself farther out into the river and into the current in order to permit an ascending steamer to pass between her and the New Orleans side, and having got still farther out into the stream in order to round the point of land at Celeste street, attacked by a rain and wind storm, she discovers a man-of-war at anchor 150 yards below her and en-

deavors with her utmost power to throw the head of her tow in toward the New Orleans shore and straighten up so as to pass between the war ship and the shore. Not being able to overcome the wind and current, and not being able to throw the head of her tow in toward the shore or to straighten herself up from a flanking position, she floats down upon the war ship and sustains injuries. For this the Court of Claims placed the whole responsibility upon the anchored ship, exonerated the moving craft, and gave judgment against the United States for all damages sustained. From this judgment we appeal, and assign the following errors:

ASSIGNMENTS OF ERROR.

The court below erred:

1. In rendering judgment against the United States on March 21, 1898, upon the findings of fact and the conclusions of law filed May 14, 1900.

2. In withdrawing its findings of fact and opinion filed March 21, 1898, and in filing new findings of fact and opinion on March 14, 1900, without having granted the appellants a new trial.

3. In permitting the judgment entered on March 21, 1898, to stand, after having withdrawn its findings of fact and opinion on May 14, 1901.

4. In holding that the collision between the tow-boat *Future City* and barges and the United States vessels of war was solely caused by the negligence of the officers in command of said ships of war, in bringing them to anchor in unusual and improper places.

5. In holding that the towboat *Future City* and barges were not guilty of any negligence which contributed to said collision.

6. In holding that the United States ships of war were anchored in improper and unusual places.

7. In holding that the United States ships of war were anchored in places which were in the track of properly navigated tows descending the Mississippi River.

8. In holding that the manner in which the *Future City* and barges descended the Mississippi River was a lawful and proper method of navigation at that time and place.

9. In holding that it was not incumbent upon the *Future City* and barges before descending into the New Orleans Harbor, in the manner described in the findings, to first ascertain if the harbor was clear, or else to divide up her tow and bring them down in smaller sections.

10. In holding that the rule of navigation upon the Mississippi River, requiring down-going boats to navigate the middle of the stream, does not apply to tows.

11. In holding that the harbor master at New Orleans must designate the anchor ground of ships of war, and in holding his failure to do so to be negligence on the part of the commanders of such ships.

12. In holding that the *Future City* possessed ample power to handle the tow which she was carrying under any and all circumstances arising in the navigation of the Mississippi River.

13. In wholly neglecting to pass upon the defendants' request for finding of fact, either affirmatively or negatively, as follows, to wit:

> The said steam towboat *Future City*, in descending the Mississippi River, as described in this and the other findings, would require most of the width of the river in order to throw the head of her tow in toward the New Orleans shore and straighten herself and tow up so as to descend the river in a horizontal instead of a flanking position, and the said steamboat could not accomplish this in a width of 1,000 feet. The said steam towboat, exerting all of her power, would descend the stream from one-half to three-quarters of a mile before she could straighten herself up from her flanking position to a horizontal one, and would descend the river at least 1 mile before she could check her headway and begin to back upstream.

14. In wholly neglecting to pass upon, either affirmatively or negatively, the following request for finding of fact asked for by the appellants:

> At the time of the collision the stern or wheel of the steamer *Future City* was 250 feet out in the river from the docks and shipping of the New Orleans side. Barge 73 struck the *Atlanta* on the barge's port side amidships.

—and in wholly neglecting to state the point of impact between barge 73 and the *Atlanta*.

15. In rendering any judgment whatever against the United States upon the facts found.

16. In rendering any judgment against the United States beyond the total sum of $10,476.35.

ARGUMENT.

I.

THERE IS NO VALID JUDGMENT EXISTING AGAINST THE APPELLANTS IN THIS CASE.

By the act of March 3, 1863 (12 Stats., 766, R. S., sec. 708), it is provided:

> That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds $3,000, under such regulations as the said Supreme Court may direct

The restrictive amount of $3,000 has been removed, so far as appeals by the Government are concerned, and now the Government is entitled to appeal to the Supreme Court in all cases in which judgment is rendered against them and the claimants in all cases in which the amount in controversy exceeds $3,000. (R. S., secs. 707, 708.)

Under and pursuant to the authority contained in this act, this court in 1866 made rules and regulations for the government of appeals from the Court of Claims to this court. Rule 4 of the rules of this court is as follows:

> In all cases in which either party is *entitled* to appeal to the Supreme Court, the Court of Claims *shall* make and file their findings of fact and conclusions of law therein, in open court, *before or at the time they enter judgment in the case.*

This rule having been made by authority of law and being in conformity with law has all the force and effect of law and is in effect a statutory regulation. It has long been settled that when the Congress, by statutory enactment, permits the order of an executive head of a department to be formulated as regulations and published, when so published and carried into effect the legislative ratification must be implied, and that hence such regulations are in effect a statutory enactment and have all the force and effect of a law of Congress. (*Ex parte Reed*, 100 U. S., 13; *Gratiott* v. *United States*, 4 How., 80; *Maddux* v. *United States*, 20 C. Cls. R., 193; *Stansbury* v. *United States*, 23 C. Cls. R., 292.)

If this is true of an Executive order issued pursuant to law, *a fortiori*, is it true of a rule of this court made under and pursuant to law; and the above quoted rule of this court is therefore as much a law as if it had been enacted by the Congress and formed a part of the organic act creating the Court of Claims. [illegible]y judgment of the Court of Claims must conform to it. Any judgment in violation of it, if not absolutely void, is at least voidable, upon appeal to this court. Inasmuch as Revised Statutes (sections 707 and 708) allow a claimant to appeal to this court in all cases where the amount in controversy exceeds $3,000 and the United States to appeal in all cases irrespective of the amount involved, it follows that rule 4 of this court applies to all cases within the original jurisdiction of the Court of Claims—to all cases in which they have the power to render judgment either for or against the

United States. It would not apply, of course, to certain claims that are sent down under the Bowman Act or the Tucker Act, for the mere ascertainment of facts to be reported to a committee of Congress or to the head of an executive department without any power to render judgment. But it does apply to every case in which the court has authority to render a judgment. The case at bar, to be sure, was heard upon a special act of Congress; but the special act only became necessary because of the organic inhibition of the Court of Claims from taking cognizance of any claim against the United States which sounded in tort, and the special act was only designed to waive the tort in this case and to confer jurisdiction upon the Court of Claims to hear the case *non obstante*. The case stands therefore precisely as though it were within the original jurisdiction of the court, and hence it follows that the law required the court below, before or at the time of the entry of judgment in said case, to file their findings of fact and conclusions of law. This was not done. The judgment in this case, which is the only judgment that has ever been rendered, was pronounced and entered on March 21, 1898. The only existing findings of fact and conclusions of law in this case were filed and entered May 14, 1900. The case was originally determined by the court below on March 21, 1898, upon which said date findings of fact and conclusions of law were filed and judgment entered in favor of the appellees. (Transcript, p. 35 and p. 5; see 33 C. Cls. R., 251.) On November 11, 1898, at the same term of the

court in which said judgment was rendered, the appellants filed their motion for a new trial. (Transcript, pp. 36–41.) This motion on behalf of the appellants was not decided by the Court of Claims until December 18, 1899, upon which said date, and after the lapse of one full term of the Court of Claims (the statute providing that the Court of Claims shall hold one annual session beginning on the first Monday in December and continuing until the business is disposed of, R. S., sec. 1052), the court entered an order overruling the appellants' motion for a new trial, but amending the findings of fact which it had hitherto filed in the case by striking out entirely Findings XVII, XVIII, and XXIII and by substituting a new finding for former Finding XXIII. (Transcript, p. 41.) On January 23 1900, and at the same term of the court in which the aforesaid order was entered, the appellants filed their second motion for a new trial and likewise their motion for a reformation and correction of the findings of fact. (Record, pp. 41–45.) This motion was not decided by the court below until May 14, 1900, upon which said date the court entered the following order (transcript, p. 45):

> At a Court of Claims held May 14, 1900, the defendants' motion for a new trial was overruled, the former findings of fact were withdrawn, and new findings of fact and opinions were filed.
>
> By the Court.

Upon these new findings of fact and conclusion of law no judgment whatever has ever been entered, and

it is attempted to permit the judgment of March 21, 1898, to remain in force as the judgment of the court upon findings of fact and conclusion of law filed May 14, 1900. These findings of fact can not be regarded as a judgment for any purpose. As was said in *Andrews* v. *Welch* (74 Wis., 134), "the findings of the court amount to nothing more than an order for judgment, and are not of themselves the judgment of the court."

When on May 14, 1900, the court below *withdrew* the findings of fact which had been filed on March 21, 1898, it necessarily withdrew the judgment which had been rendered upon those findings of fact, since when the findings were withdrawn there was nothing left upon which a judgment could possibly be entered. The findings which the Court of Claims is required by law to file before or at the time of the entry of judgment is a special verdict (*United States* v. *Smith*, 94 U. S., 214); and it follows that a judgment rendered without any verdict or finding in the nature of a verdict is, if not void, certainly voidable upon appeal.

The issues raised by the pleadings, whether of law or fact, must be determined in favor of one party or the other before any judgment can be entered. In other words, there must be either findings by the court or the verdict of the jury; and a judgment entered without either verdict or findings is fatally erroneous, if not absolutely void. (*Stansell* v. *Corning*, 21 Mich., 242; *Mace* v. *O'Reilly*, 70 Cal., 231; *Whittelsey* v. *R. R. Co.*, 23 Conn., 436; *Haxton* v. *McClaren*, 132

Ind., 235; *Furguson* v. *Seawell*, 1 Mo., 256; *Watson* v. *R. R. Co.*, 17 Abb. N. Cas. (N. Y. Super. Ct.), 289; *Merchants Bank* v. *Pope*, 19 Oregon, 35; *Sthal* v. *Gotzenberger*, 45 Wis., 121; *Pierpont* v. *Pierpont*, 19 Texas, 227; *Maryott* v. *Gardner*, 50 Neb., 320; *Garner* v. *The State*, 28 Kansas, 790.)

In some of the States, upon the trial of questions of fact by the court, it is not necessary for the court to state its findings except generally, for the plaintiff or defendant, unless requested by one of the parties with the view of excepting to the decision of the court upon questions of law involved in the trial, in which case it is the duty of the court to state in writing the findings of fact separate from the conclusions of law. (For list of such States and decisions thereunder see 8 Ency. Pr. and Pl., 934.) The right of a party to have the court make separate conclusions of fact and of law is a substantial right, and a judgment should be reversed for a refusal to grant such right. (8 Ency. of Pl. and Pr., 935, and cases cited in the notes.)

In other States the court is required by law to state separately the facts found and the conclusion of law thereupon, just as is required of the Court of Claims. In such States it is universally held that the failure on the part of the court to make such separate statements in the findings renders its judgment reversible upon appeal. (*Harris* v. *Hay*, 111 Pa. St., 564; *Sweigard* v. *Wilson*, 106 Id., 213.)

In *Russell* v. *Armador* (2 Cal., 305) it was said:

> We are of opinion that this law is not merely directory, and we have no right to destroy or

> impair its efficacy. It is intended by it that the decision of the court shall be the basis of the judgment in the same manner as a verdict of a jury; and it follows that without such decision the judgment can not stand. (See in accord, *Drainage District No. 4* v. *Crow*, 20 Oregon 535.)

Stansell v. *Corning* (21 Mich., 244) presents a case quite similar to the one at bar. In that case the court said:

> It appears that the case was tried before the court without a jury on the 20th of January, 1870; that each party seasonably presented points in the nature of requests to charge, under rule 87 of the rules of the circuit court, and also requests for a finding in writing of the facts and conclusions of law, as provided by said rule and section 3437, Comp. Laws. It also appears that the court thereupon held the case for advisement, and at the next regular term, held in March following, caused a judgment to be entered in favor of the plaintiff for $1,861.82, without any findings of fact; but thereafter, and on the 13th of April, made a finding of the facts and law, which was filed. The interval between the judgment and the findings of fact in the case was about one month. It is objected by the first and second assignments of error, that the entry of the judgment under the circumstances, in advance of the findings, was error, and we think the objection well taken. When a written finding is duly requested under the rule and statute, a compliance by the court is imperative and the finding contemplated is in the nature of

a special verdict, and is designed as a basis for the judgment in the cause, and until such finding there can be nothing on which to found a judgment. It is just as essential in legal contemplation that this finding should precede the judgment as it is that a judgment should follow and not precede a special verdict; and in each case the judgment is the necessary conclusion which the law infers from the facts, and until these facts are regularly ascertained there can be nothing from which such conclusion can result. When the judgment is to depend upon the facts found by the court, it is settled that the judgment may be overturned upon the ground that the facts found do not support the judgment; and this being so, it must be conceded that the absence of any findings of fact whatever must be equally fatal. When the judgment in this case was rendered, it had no greater validity than a judgment in a jury trial without a verdict. It was a judgment unsupported by facts found or verdict rendered, a conclusion without premises, and has hitherto so continued. The subsequent filing alone did not cure the error. As a finding subsequent to the judgment it constituted an error, and it could not be the foundation of a judgment already rendered without such foundation. It is therefore seen that the judgment stands without any findings of fact to warrant it, and that the finding of facts remains without any judgment based upon it. If the judgment may precede the finding one month it may upon the same principle precede it twelve months, and such a practice would occasion serious difficulties.

The judgment was reversed with costs and a new trial ordered.

To correct the errors of the former findings the appellants pursued the proper and lawful method by motion for new trial. It is well settled that where the facts are not correctly found the method of procedure is by motion for new trial. A motion for a new trial is the proper method where the finding, although in proper form, fails to state such facts as are necessary to support the conclusions of law; where the special finding fails to find all the facts established by the evidence; where the finding is contrary to the evidence, or without sufficient evidence; or where the finding is not sufficiently specific. (See 8 Ency. Pl. and Pr., 951, and cases cited in voluminous notes.)

The only way in which the court below could lawfully have withdrawn its former findings of fact, conclusion of law, and opinion, would have been by granting a new trial to the appellants and making the desired change upon the new trial. It was absolutely without authority in law to do this of its own motion at a different term of the court, two years and more after the judgment had been rendered, and after having overruled the motion for a new trial; and then, too, to attempt to permit a two-year old judgment to stand as the judgment of the court upon findings of fact, conclusion of law, and opinion filed two years later. After the special finding of the court is filed and judgment rendered it is thoroughly well settled that the power of the court over it is at an end, except that the

court may at any time before the close of the term at which the judgment is rendered grant a new trial, and, of course, under the provisions of section 1088, Revised Statutes, the Court of Claims has equal power to grant a new trial to the Government after the term at which the judgment is rendered, although not to the claimant, "upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice has been done to the United States." But it has no power to do anything else after the term except that which is authorized by this statute, to wit, *to grant a new trial.* It has no power to withdraw its findings of fact, conclusions of law, and opinion, unless it grants the defendants a new trial and does so upon such new trial. (*Prince* v. *Lynch*, 38 Cal., 528; *Smith* v. *Taylor*, 82 Cal., 533; *Levy* v. *Chittenden*, 120 Ind., 37; *Hartlepp* v. *Whiteley*, 129 Ind., 576; *Wray* v. *Hill*, 85 Ind., 546; *Tarkington* v. *Purvis*, 128 Ind., 189; *Lang* v. *Baxter*, 69 Fed. Rep., 905; *Baptist, adm.*, v. *Farwell Transportation Co.*, 29 Fed. Rep., 180; *Marye* v. *Strouse*, 5 Fed. Rep., 494; *Klever* v. *Seawall*, 65 Fed. Rep., 373.)

In *Smith* v. *Taylor* (*supra*), the court said:

> A court can not change its finding after the entry of judgment without granting a new trial and doing it upon the new trial.

In *Lang* v. *Baxter* (69 Fed. Rep., 905) it was held that where a case has been tried by the circuit court upon a waiver of a jury and the court has decided it and made special findings covering the ultimate facts of the case, additional findings can not afterwards be

made upon the request of a party. *Insurance Company* v. *Boon* (95 U. S., 117), distinguished.

In *Insurance Company* v. *Boon* (*supra*) the court tried the issues of fact, and its opinion, embodying its findings and conclusions of law thereon, was filed concurrently with the entry of judgment, but there was no formal findings of fact, and the court at the next following term, upon rule awarded, and, after hearing the parties, made an order that a special finding with the conclusions of law conformably to that opinion so filed be entered *nunc pro tunc* and made part of the record as of the term when the judgment was rendered. It was held by this court that such order was within the discretion of the court, and that by it such special findings became a part of the record of the cause, and that the judgment upon it was, without a bill of exceptions, subject to review in this court.

Comment is unnecessary to show that *Insurance Company* v. *Boon* in no wise militates against the doctrines contended for in this brief. A court may, of course, make such modification or correction of its findings as shall make them conform to the truth and cover the issues in the case, but this must be done before the entry of judgment. (*Smith* v. *Taylor*, 82 Cal., 533; *Calhoun* v. *Gilliland*, 2 Wash. Terr., 174; *Dowell* v. *Tolbot Paving Co.*, 138 Ind., 691.)

In this connection we are not unmindful of the decision of this court in *North* v. *Peters* (138 U. S., 271). In that case, however, there had been a general verdict found by a jury upon the vital issue in the case. The

remaining issues were tried under the provisions of the Dakota Code of Civil Procedure, sections 5066 and 5067, which provide as follows:

> Upon the trial of a question of fact by the court its decision must be given in writing and filed with the clerk thirty days after the case is submitted for decision.
>
> In giving the decision the facts found and conclusions must be separately stated. Judgment upon the decision must be entered accordingly.

Under these provisions of the statute the following case arose: A merchant in Dakota, intending to defraud his creditor, sold his entire stock of goods, much of which was of a perishable nature, together with the good will of the business to N, who was entirely ignorant of his purpose and who paid an adequate consideration for them. Sundry creditors of the merchant sued out writs of attachment against him. These were placed in the hands of the sheriff, who seized the goods as the property of the merchant. N brought suit against the sheriff to compel him to surrender the property and to restrain him from again levying upon it as the property of the merchant, and a preliminary injunction was issued. The question of the validity of the sale was submitted to the jury, who found in favor of the plaintiff. The court thereupon ordered that the preliminary injunction should be made perpetual. The defendant moved for a new trial, claiming that the court had failed to find on certain material issues. The court at a subsequent term

denied the motion and made additional findings more explicitly responsive to the questions presented by the pleadings, and a further conclusion of law that it was extremely difficult to ascertain the amount of compensation that would afford adequate relief; that it was necessary to restrain the acts done and prevent a multiplicity of suits, and that the plaintiff was entitled to the relief demanded in the complaint. None of the previous findings, however, were withdrawn, nor in anywise modified. It was contended that the additional findings made by the court were unwarranted under the provisions of the Dakota Civil Code, but this court held to the contrary.

It will be observed, therefore, that *North* v. *Peters* is totally dissimilar from the case at bar. In the first place, the provisions of the Dakota Civil Code are entirely unlike rule 4 of this court, in that they do not require that the findings of fact and conclusion of law shall be filed before or at the time of the entry of judgment. In the second place, there had been a general verdict by a jury in *North* v. *Peters*, which was sufficient to uphold the judgment. In the third place, there was no provision in the Dakota Civil Code analogous to the provisions of section 1088 of the Revised Statutes, under which, it is submitted that the power of the court to disturb the judgment after the term at which the judgment was rendered is confined to granting a new trial to the Government.

But even if it be assumed that *North* v. *Peters* is authority for holding that a court may file supple-

mental or additional findings of fact after the term at which the judgment was rendered in support and in further elucidation of that judgment, upon a motion for a new trial, it certainly can not be regarded as authority for the proposition that a court, more than two years subsequent to the rendition of the judgment and after two terms of the court had elapsed, has authority to entirely withdraw its findings of fact, its conclusions of law, and its opinion, and to file an entirely new set of findings of fact, an entirely new conclusion of law, an entirely new opinion, without filing the same *nunc pro tunc*, and without even reciting that they are filed in lieu of those thus withdrawn, and yet to permit the judgment to stand which had been rendered two years previously upon an entirely different set of findings of fact. These findings of fact, which the court below filed on May 14, 1900, can not in any sense be regarded as an amendment to the ones which they filed on March 21, 1898, albeit some of the new findings are precisely like the old ones. If one razes a house to the ground and digs up its foundations and constructs an entirely new house upon the site of the old one it is the building of a new house and not the repairing of an old one, albeit some of the material of the old one be used in constructing the new one. The new findings of fact filed on May 14, 1900, while in some respects similar to the old ones, are in many other respects directly contrary and antagonistic to them, as will be presently shown. So much so that it is inconceivable that the court intended to enter the

same judgment upon the new findings that it entered upon the old ones. These findings are not amendments or substitutions. They are, on the contrary, a complete new set of findings and a complete new special verdict, upon which no judgment has ever been entered.

II.

DAMAGES RESULTING TO THE UNITED STATES BY PERMITTING THE JUDGMENT OF MARCH 21, 1898, TO STAND AS THE JUDGMENT OF THE COURT UPON THE FINDINGS FILED MAY 14, 1900.

It is not a mere technicality which we are now urging upon the attention of the court, but a matter of the most serious moment to the appellants. The damages which the Government will sustain, if the judgment of the court rendered upon the findings filed March 21, 1898, is permitted to stand as the judgment of the court upon the findings filed May 14, 1900, are threefold.

First. In the matter of interest. It is provided by law (26 Stat. L., 504, par. 4, 1 Supp., 811), that in all cases where the judgment appealed from is in favor of the claimant and the same is affirmed by the Supreme Court, interest thereon at the rate of 4 per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment. Judgments of the Court of Claims are presented for payment to the Secretary of the Treasury immediately upon their rendition, as was done in the case at bar, and hence from the 21st of March, 1898, to the 14th of May, 1900, would entitle the claimant to some $1,600 interest upon the judg-

ment. In making its motions for new trial, and in vigorously pressing them, the Government was well within its legal rights under the provisions of section 1088 of the Revised Statutes, as well as within its legal rights independently of that statute, because said motions for new trials were made always within the term, and certainly it was not the fault of the Government if the court should hold one of the motions under advisement for a year and two months and another under advisement for more than six months. While these motions were pending and undisposed of the judgment was not and could not become a finality. It is submitted that this judgment did not become a final judgment until May 14, 1900, by reason of the pendency of these motions for new trials, which were not disposed of until that date. (*Murdock* v. *District of Columbia*, 23 C. Cls. R., 41; *Brocket* v. *Brocket*, 2 How., 228; *Slaughter-House cases*, 10 Wall., 289; *Cambreston* v. *United States*, 95 U. S., 287; *R. R. Co.* v. *Bradley*, 7 Wall., 575–578; *Dorsey* v. *Tyack*, 14 How., 297, 312.) If the judgment of the court below should be affirmed by this court it would necessarily have to take effect from the 21st of March, 1898, inasmuch as no other judgment has ever been entered, and the result would be to compel the United States to pay the sum of $1,600 interest upon a judgment which had not become final and which the court still had under advisement and consideration.

In the second place, the judgment of March 2, 1898, is for a very considerable sum more than should have

been entered upon the findings of fact filed May 14, 1900. By reference to those findings of fact and the opinion which accompanied them, the whole of which is reported in the Court of Claims Reports, volume 33, at page 251, of which this court will take judicial notice, and which, for the convenience of this court, is inserted as an appendix to this brief, it will be found that in Finding XII the court found as follows:

> When they (the men-of-war) were first made out and discovered by the *Future City*, as aforesaid, the United States vessels were anchored on a single or swinging chain (i. e., with but one anchor out) and on this account were constantly changing their positions from side to side with each variation of wind and current and thus varying the distances between them and the New Orleans or western shore of the river.

It will likewise be observed that in Finding XVI (bottom of page 259, 33 C. Cls. R.), the court found as follows:

> As the *Future City* reached a point about opposite to her, the *Galena*, which was swinging in and out on a single chain, sheered in toward the New Orleans shore and struck barge 68, which was the lead barge of the said tow, on the starboard side, and thereby cut down and sunk the said barge with all her cargo on board, and the said barge, together with her freight earnings, became a total loss to the claimant.

Turning now to the opinion of the majority of the court we find that the two foregoing findings of fact formed the sole basis of the judgment of the court

against the United States for the value of barge 68 and her cargo, as witness the following language of the court in its opinion, on page 271:

> If the *Galena* had not sheered in at the time of the collision with barge 68 that much of the accident would not have occurred.

Turning now to the itemized statement of the judgment as set forth in Finding XVI (transcript, p. 12), we find that the value of barge 68 is placed at $6,500 and its freight earnings at $2,832.50, making a total of $9,352.50, for which a judgment was rendered against the United States under the findings of fact filed March 2, 1898, for the reason that as the barge approached the *Galena*, the *Galena* suddenly sheered in toward the New Orleans shore, striking barge 68 and sinking her, because the *Galena* was negligently anchored upon a single chain.

Manifestly, now, if the fact upon which this judgment is based shall be destroyed, the judgment must necessarily go with it. The fact upon which the judgment is based has been completely demolished and was totally withdrawn from the new findings of fact filed on May 14, 1900, and the sentence quoted from the opinion of the court was likewise withdrawn in the new opinion filed upon that day. It was shown to the complete satisfaction of the court that the foregoing statement was not only in hopeless conflict with the testimony in the case, but was a physical impossibility, inasmuch as the *Galena* was held steady in her berth by the action of the wind and current then and

there existing in the Mississippi River, and not only did not, but could not, possibly sheer in toward the New Orleans shore and strike barge 68. Accordingly, the court withdrew the statement from its findings of fact and withdrew the conclusion from its opinion. (See defendants' motion for new trial, transcript, p. 37, top; order of the court, transcript, p. 41, middle, and compare Finding XII and Finding XVI as originally found on pp. 257 and 259 of 33 C. Cls., R., and as now found on pp. 10 and 11 of the transcript.) It is inconceivable, therefore, that the court intended to enter the same monetary judgment against the United States upon the findings of May 14, 1900, as was rendered upon the findings of March 21, 1898, since it is shown by their own findings, conclusions of law, and opinion that the defendants were not responsible for $9,332.50 of the damage sustained by the *Future City* and barges, and hence the judgment of May 14, 1900, instead of being for $19,808.85 should have been for $10,476.35.

In the third place, there is another suit pending in the Court of Claims awaiting the ultimate decision of this case and which necessarily will be determined by the judgment and opinion in the case at bar, in which the owners of the cargoes upon the barges which the *Future City* had in tow at the time of this collision demand of the United States the sum of $78,368.80. This is the case of the *Boston Marine Ins. Co. et. al.* v. *United States*, No. 18757, which was filed January 3, 1895, a copy of the petition in said case being attached to this brief as an appendix. By reference to

paragraph 5 of this petition it will be seen that the value of the cargo upon barge 68, which was in collision with the U. S. S. *Galena*, is placed at $48,719, and that therefore if the judgment in the case at bar should be affirmed the Government would be called upon to pay said $48,719 as a result of the collision between said barge 68 and the *Galena*, notwithstanding the Court of Claims has totally eliminated from its findings the fact upon which they based their judgment of negligence against the *Galena*, to wit, that the *Galena* sheered in toward the New Orleans shore and struck barge 68, and have totally eliminated from their opinion the conclusion of law upon which their judgment was based.

It is therefore submitted that the judgment of the court below should be declared void and of none effect, or that the same should be reversed and the case remanded to that court with directions to grant the appellants a new trial, or at least reversed with directions to enter judgment in conformity with the findings of fact in the sum of $10,476.35.

III.

AN EXAMINATION AND COMPARISON OF THE FINDINGS OF FACT AND OPINIONS, FILED MARCH 21, 1898, AND MAY 14, 1900, RESPECTIVELY, SHOWING THAT THE PRESENT FINDINGS OF FACTS ARE NOT SUFFICIENT TO SUPPORT THE JUDGMENT OF MARCH 21, 1898, AND THAT THE PRESENT FINDINGS CHARGE NO NEGLIGENCE ON THE PART OF THE SHIPS OF WAR, SAVE ONLY AS TO THE PLACE OF ANCHORAGE, WHICH IS UNFOUNDED IN LAW.

Although the findings of fact of March 21, 1898, were subsequently altered by the complete elimination

of some and the very material alterations in others and in the making of new findings, yet the phraseology of the findings that were retained, either in whole or in part, has not been altered in several important places to suit the changed conditions, but, on the contrary, reference is frequently made to the eliminated findings by the use of such words as "aforesaid," when there is no aforesaid. This inadvertent inaccuracy likewise occurs frequently in the opinion, and the opinion in several places refers to, and sometimes quotes from, several of the findings of fact which were on May 14, 1900, withdrawn and completely suppressed. These inaccuracies are manifestly mere inadvertences, oversights, or clerical errors; but the result is confusing, and in the interests of perspicuity a brief examination of the two sets of findings and the two opinions will now be made.

Finding IX. A comparison of Finding IX as filed on May 14, 1900, and as it now appears upon page 9 of the transcript, with Finding IX as filed on March 21, 1898, and as it appears on pages 256 and 257 of 33 C. Cls. R., discloses the following alterations: In the original finding it was found that the warships were ranged along the western bank of the river and their distances from said bank varying from 350 to 650 feet, whereas in the new finding the distance of said ships from the western bank of the river is given at from 500 to 700 feet, and the distance of the *Atlanta* is changed from 650 feet to 600 feet.

Finding XII. A comparison of Finding XII as it now appears on page 10 of the record with the corre-

sponding finding filed on March 21, 1898, and as it appears on page 257 of volume 33, C. Cls. R., discloses the fact that the following words in the original finding have been entirely cut out and eliminated from the present finding, to wit:

> When they were first made out and discovered by the *Future City*, as aforesaid, the United States vessels were anchored on a single or swinging chain (i. e., with but one anchor out), and on this account were constantly changing their positions from side to side with each variation of wind and current, and thus varying the distances between them and the New Orleans or western shore of the river.

And yet, notwithstanding that this charge of negligence has been totally eliminated from said finding, we find that by the use of the word "aforesaid" the charge is practically retained, as follows:

> By reason of their being anchored so high up the river such short distances below the point of land at Celeste street and so close to the New Orleans shore, *and by reason of their swinging at anchor as aforesaid*, they rendered the navigation of the river by towboats, with tows pursuing their usual and customary course, hazardous and extremely dangerous.

The court will immediately observe that there is no "aforesaid" upon which to base this statement. The finding that the ships were anchored upon a single chain and swinging in and out, having been conclusively proven to be untrue and impossible, was totally stricken out of the findings by the court. And yet this

last sentence in the original finding was unintentionally permitted to remain and was not altered in conformity with the changed finding. When the court's attention is called to it of course it becomes a mere meaningless inadvertence, although without explanation it would cause considerable confusion. Not only did the court fail to change the phraseology of Finding XII to conform with the amendment made, but they have likewise retained in their opinion a reference to that portion of Finding XII which has been totally eliminated and destroyed. On page 20, folio 23, of the transcript, the following sentence occurs in the opinion of the majority of the court:

> All the ships were anchored with a single chain and were swinging to some extent.

It has been shown that this statement, which occurred in the original findings of the court, has been entirely erased from the present findings. There is therefore no finding of fact upon which this sentence in the opinion of the majority of the court can rest, and its presence in the opinion is a mere inadvertence or oversight, due to the failure of the majority of the court to edit their opinion to conform to the new findings of fact.

Finding XVI. A comparison between Finding XVI as filed on March 21, 1898, and as it appears on pages 258, 259, and 260, of 33 C. Cls. R., with the corresponding finding as it now appears on page 11 of the transcript, discloses that the following sentence in the original finding has been totally eliminated from the finding as it now appears, to wit:

> As the *Future City* reached a point about opposite to her, the *Galena*, which was swinging in and out on a single chain, sheered in toward the New Orleans shore and struck barge 68, which was the lead barge of the said tow, on the starboard side, and thereby cut down and sunk said barge with all her cargo on board, and the said barge, together with her freight earnings, became a total loss to the claimant.

A comparison of the original opinion with the opinion as it appears in the present transcript discloses the fact that the following words in the original opinion (33 C. Cls. R., bottom p. 271) have been totally eliminated from the present opinion (compare transcript, p. 19, with p. 271, **33** C. Cls. R.):

> If the *Galena* had not sheered in at the time of the collision with barge 68 that much of the accident would not have occurred. Where a steamer is wrongfully in dangerous proximity to a flatboat and the proximate cause of the collision is an unexpected sheer given to a flatboat by an eddy, the steamer is in fault and must bear the whole loss. (*Fritz* v. *Bull*, 12 How., 466.) This was held in a case where the flatboat was, from the time of its discovery by the steamer, in the proper channel of downward navigation, floated onward only by the current. The flatboat being in an eddy and unable to direct its course with the same degree of certainty and promptness as a steamer, and the steamer's pilots having disregarded the consequences which eddies must produce, the loss was put upon the steamer.

Notwithstanding the court has totally eliminated this charge of negligently anchoring upon a single chain, notwithstanding the court has totally eliminated the finding that the *Galena* sheered in toward the New Orleans shore and struck and sunk barge 68, and notwithstanding that the former alleged facts, which are now shown to be untrue, were the sole basis of the judgment which the court rendered against the United States for the loss of barge 68 and its cargo, yet we find, in turning to Finding XVI (transcript, p. 12, top), and in turning to the judgment of the court upon said finding (record, p. 35, bottom), that the court has retained in its judgment the amount of the value of barge 68, amounting to $6,500, together with the freight earnings on barge 68, amounting to $2,832.50, amounting in all to $9,332.50 Surely the court did not intend to render this judgment upon its present findings of fact, and surely the retention of this amount in the judgment was an inadvertence, an oversight, or a clerical error in failing to conform its judgment to the new findings of fact.

There is still another error in Finding XVI, at the top of page 12 of the transcript, to which the court's attention is invited, to wit, the statement that the *Richmond* was lying 300 feet from the barge landing on the New Orleans side of the river. By reference to Finding IX (transcript, p. 9) it will be seen that the closest distance which any ship in this fleet is found to have occupied with reference to the New Orleans shore is 500 feet, the statement being that said fleet of ships

were anchored "along the western bank of the river, which is the city side, their distances from said bank varying from 500 to 700 feet." Manifestly, therefore, the *Richmond*, according to the court's own findings, as they now appear, could not possibly have been closer to the barge landing or New Orleans shore than 500 feet. The statement in this Finding XVI that she was 300 feet from said shore is another inadvertence, oversight, or clerical error, due to a failure on the part of the majority of the court to make the changes throughout the old findings which would make them conform to the new findings. In original Finding IX these vessels were placed at from 350 to 650 feet, but in the new Finding IX that distance is changed from 500 to 700 feet, but the old statement in Finding XVI was unintentionally or inadvertently permitted to remain, and was not changed as it should have been to conform to the new distances given in new Finding IX.

Former Findings XVII and XVIII. A comparison between the findings of fact filed March 21, 1898, Nos. XVII and XVIII, as they appear at the bottom of page 260, 33 C. Cls. R., and the findings as they now appear in the transcript of the record, discloses the fact that said findings have been totally canceled and withdrawn and do not now appear in the record in any shape or manner. These original findings were as follows:

> XVII. When the said United States vessels visited the port of New Orleans during the winter previous to the date of said collision with the *Future City* and her tow, the officer in

> command of the squadron, on making inquiry, was directed by the chairman of the board of harbor masters of New Orleans to anchor the said vessels as near to the Algiers shore of the river as possible, and was then told that in such an anchorage they could lie in safety and would not interfere with or endanger the customary navigation of the river.

It was conclusively proved to the court that this statement was untrue, and that as a matter of fact this fleet of warships were never in the harbor of New Orleans at any time except on May 5 and 7, 1888, when the collision occurred. (See defendants' motion for new trial, transcript, p. 37.)

Original Finding XVIII, which is now totally eliminated from the findings, was as follows:

> When the war vessels visited the port of New Orleans on previous occasions they anchored from Canal street down to the custom-house, but on no occasion or at any time were they ever anchored just below the bend of the river near Celeste street, as in this instance. Immediately below and under the point on the Algiers side of the river above which there was a convenient, safe, and proper place for vessels to anchor there was a strong eddy. Vessels coming from the south all came through that eddy, striking the current at the point; then they headed quarter over to the city side close along the shipping to make their landings.

This finding is now totally eliminated and does not appear at any place in the transcript. Notwithstand-

ing this fact, however, the whole finding is quoted verbatim in the opinion of the majority of the court on page 20 of the transcript, and these findings of fact which have now been withdrawn and which have been repudiated by the court and which have been proven conclusively to be untrue are still made the sole basis of the court's judgment and opinion that these war ships were anchored in unusual places where navigators of other craft would not expect to find them, but on the contrary would expect to find them over toward the Algiers shore where they had anchored on previous occasions, and is further made the sole basis of the judgment and opinion of the majority of the court that said ships of war were anchored in the track or fairway of ascending and descending tows.

Former Finding XXIII. An examination and comparison of the findings of fact filed March 21, 1898, as it appears on pages 262, 263 of 33 C. Cls. R., with the findings of fact filed May 14, 1900, as they appear in the transcript of the record, discloses that former Finding XXIII has been totally withdrawn and eliminated, and likewise that all that portion of the opinion based upon said finding has likewise been withdrawn and eliminated, and that in lieu thereof a totally new finding has been made which appears as Finding XXI, at the top of page 14 of the transcript.

Original Finding XXIII was as follows:

> Early in 1888 a fleet of United States war vessels, consisting of the *Atlanta*, *Galena*, *Ossipee*, *Yantic*, and *Richmond*, visited the port of New Orleans, La., during the carnival of the Mardi Gras,

anchoring in said port partly below and partly above a point opposite Canal street in said city. While in this position complaint was made that said men-of-war were in the way of other craft navigating the harbor. Thereupon the commodore of the said fleet of United States vessels sent for John Brewster, chairman of said board of harbor masters, and, informing him of said complaint, requested said Brewster to select for and assign to his fleet an anchoring ground where said fleet might lie at anchor out of the way of other craft. Said Brewster did thereupon select for and assign to said fleet a place of anchorage in said harbor, drawing a line and pointing out the place at which he ordered and required said fleet to anchor. Said fleet then proceeded to sea for a short while, and upon returning to New Orleans dropped anchor at the places of collision as aforesaid, and continued to anchor at those places until May 7, 1888, when the foremost of said fleet, the *Atlanta*, was run into by barges in tow of the *Future City*, as hereinafter set forth in these findings. The places selected for anchorage by the war vessels were not the places assigned for the anchorage by the chairman of the board of harbor masters. Upon the return of the war vessels in May the harbor master was not notified of the fact, nor was word left at the central office that the vessels had returned. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet upon its return and was without knowledge of the places taken in the river by said war vessels.

Upon motion for new trial it was demonstrated to the complete satisfaction of the court that this so-called finding of fact was without foundation; that said fleet of vessels were not at New Orleans in the early part of 1888, nor at the Mardi Gras festivities of that year, but, on the contrary, were at Greytown, Central America; that said war vessels never did visit New Orleans except on the 5th of May, 1888, at the time this collision occurred, and that the commodore of said fleet never had any such conversation as that detailed with the chairman of the board of harbormasters, and that the board of harbor masters never did assign any place of anchorage for said fleet, and that said fleet never did disobey his orders in this respect. Accordingly all this finding was withdrawn and stricken out by the court, and the court likewise withdrew and struck out from its opinion all that portion of the opinion which appears on pages 274 and 275, of 33 C. Cls. R., which was founded upon this finding of fact and which charged the commodore of the fleet with negligence in failing to anchor where the harbor master had told them to anchor.

It is manifest therefore that the findings of fact as they are now presented to this court do not charge the officers in command of the ships of war with any negligence whatsoever except as to the *place* at which they were anchored. There is no finding that they were anchored upon a single chain; there is no finding that they swung in and out upon a single chain; there is no finding that the *Galena* sheered in toward

the New Orleans shore and struck barge 68; there is no finding that the chairman of the board of harbor masters directed the fleet to anchor at a certain place, which direction was disobeyed by the commodore of the fleet, nor any finding that charges the officers in command with any negligence except as to the place at which the ships were anchored. The court will observe from an examination of the petition that there is in it no charge of this sort, the sole charge of negligence being the place at which the ships were anchored, and hence, even if such a finding had been made, it is not believed that they could have been sustained because not warranted by the pleadings. In the liberal, not to say lax, rules which obtain in the court below with reference to pleadings, the petition in this case could doubtless have been amended at any time before judgment so as to cover such allegations. But it was not amended and does not contain any such charge. A court can not properly put upon its record a judgment which is not a proper sequence to the pleadings. It is thoroughly settled that the judgment must conform to and be supported by the pleadings in the case. A recovery must be had, if at all, upon the facts alleged, and facts proved but not pleaded will not support the judgment. (11 Ency. of Pl. and Pr., 868, and a multitude of cases cited.)

III.

COMMENTS ON FINDINGS VI, VII, XXI, AND XXII, SHOWING THAT THEY ARE NOT FINDINGS OF FACT AT ALL, BUT ARE MERE OPINIONS OR CONCLUSIONS UPON MIXED QUESTIONS OF LAW AND FACT.

Finding VI (Transcript, p. 6) is as follows:

> The *Future City* and the barges comprising her tow were all staunch, sound, and seaworthy, and were fully and adequately manned, officered, and equipped, and the *Future City* was amply powerful and able to handle her said tow under any and all circumstances arising in the navigation of the Mississippi River. Steamers like the *Future City* could safely handle fifteen loaded barges 1,000 feet in length as one tow.

It is submitted that this is not a finding of fact at all, but a mere conclusion to be drawn from all of the substantive facts of the case as viewed from a legal standpoint. And evidently this so-called finding of fact is not the unanimous verdict of the court, for manifestly Judge Peelle did not agree to it. On page 34 of the transcript Judge Peelle, in his dissenting opinion, after stating that the *Future City* was negligent in her course of navigation, says that the master of the *Future City* should have straightened up his tow before entering the harbor: "*or if she could not control her tow, as seems probable from the results*, she should have broken it up at or prior to the time she reached the elevator," etc. The findings of fact by the Court of Claims is a special verdict, and, like every other verdict, it must be unanimous; and unless it is unanimous, it is no verdict at all. It is submitted that this portion of the verdict was

not unanimous, in view of the fact that one of the members of the court does not agree to it.

But this aside, it is submitted that the statement here contained is not, properly speaking, a finding of fact at all, but a mere conclusion. Whether a towboat has sufficient power to handle the tow which she is undertaking to carry in any and all circumstances arising in the navigation of a river is a conclusion to be drawn from all the facts and circumstances of a given case. These being known, it is a matter of judicial judgment to determine whether or not the results demonstrate that the tug possessed sufficient power to handle her tow, and this judicial judgment upon the facts of the case, as viewed from a legal standpoint, ought to be subject to the review of the appellate court, and it is error to preclude the rights of the appellants by a dogmatic assertion of this sort under the guise of an ultimate finding of fact. It is not an ultimate finding of fact, but an ultimate judgment upon all the facts which go to make up the conclusion. What the court below should have done and what the court below was asked to do was to incorporate in its findings all of the facts upon which it based its judgment and leave this court to determine whether that judgment was correct upon the facts found.

The question here presented is precisely similar to the one which this court had before it in the recent case of *United States* v. *Gleason* (175 U. S., 588–608). In that case there was a contract between Gleason and the United States for certain excavation work upon

the Ohio River. The contract contained the following provision:

> If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in judgment of the engineer in charge fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then, in either case, the party of the first part, or his successor, shall have power, with the sanction of the chief of engineers, to annul this contract. * * * *Provided, however*, That if the party or parties of the second part shall, by freshet, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented from either commencing or completing the work, or delivering the material at the time agreed upon in this contract, such additional time may in writing be allowed them for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable.

Having failed to complete the work in the time specified by the contract, and within the time of three extensions thereof, the contractors presented their application for a further extension of time within which to complete said work, alleging that they had been prevented from completing the same by reason of ice, freshets, and the force and violence of the elements. The engineer in charge refused this application for

further extension without assigning any reasons for his refusal. The Court of Claims found as a fact that—

> No judgment or decision was given by said engineer on the question as to whether the claimants were prevented by freshets and force and violence of the elements, during the season of 1888, from completing the work agreed upon within the period limited by the last extension of the contract, nor did he decide that the claimants were not so prevented.

This finding was characterized by this court as a conclusion of law and not a finding of fact. This court quotes the so-called finding of the Court of Claims and says:

> But as it was expressly alleged in the petition and was found by the court that on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiff, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount to a decision or judgment within the meaning of the contract, because the court reached a different conclusion. These are propositions of law and not of fact, and we can not assent to either of them.

So here, the court below is of the opinion that the *Future City* had ample power to handle her tow and therefore they proceeded to find their opinion as a fact

just as they found their opinion as a fact in the Gleason case. What they should have done in the Gleason case was to have found the facts and left this court to determine whether or not that amounted to a decision by the engineer within the meaning of the contract, and this court so held. So what they should have done in this case would have been to have found all of the facts and circumstances concerning the navigation of this tow, one of the most important of which was the distance which she would go before being able to flip herself around or to back upstream, and then left this court to determine whether or not from the facts so shown the *Future City* had ample power to handle her tow under any and all circumstances arising in the navigation of the Mississippi River.

To the same effect is the ruling of this court in *Leovy* v. *United States* (177 U. S., 621–628). In this case a dam had been builded across Red Pass, a certain tributary of the Mississippi River, and had been required to be removed by the Secretary of War under the provisions of the act of July 13, 1892, and upon the refusal of the defendant to remove the same as required by said act he was tried and convicted in the circuit court for the eastern district of Louisiana. Upon certiorari in this court the question arose whether said Red Pass was a navigable water of the United States. It was contended that inasmuch as this question of fact had been left by the trial judge to the jury to determine, and inasmuch as they had determined it in the affirmative, their decision was binding upon this

court and was not subject to its review upon the evidence. But this court declined to accept this view, holding that whether a stream was a navigable water of the United States was a conclusion to be drawn from all the facts and circumstances of the case and that this court having before it such facts and circumstances would determine for itself whether or not said pass was a navigable stream. The court accordingly proceeded to examine the testimony, reached the conclusion that said pass was not a navigable water of the United States, and reversed the judgment of the court below.

So here the question of whether a towboat possesses sufficient power to handle her tow under any and all circumstances arising in the navigation of the Mississippi River is a conclusion which the court will reach from an examination of all the facts relating to the capabilities of said towboat and characteristics of the stream in which she was navigating, together with the attendant circumstances of the navigation, to wit, the character of the structure of the towboat, her steam capacity, her tonnage, her horsepower, how far she would descend the river before being able to straighten up her tow, how far she would descend the river before being able to check her headway or to back upstream, what width of the river it would be necessary for her to occupy in order to round the point at Celeste street, the currents and eddies of the Mississippi River at this point, the size and character of the tow which she had in charge, and any other facts pertinent to the issue; and this court is not to be precluded from reaching

its own conclusions upon this issue by any so-called finding of facts which seeks to conclude the matter any more than it was to be precluded in the Leovy case by a finding of the jury that a certain stream was a navigable water of the United States.

In the defendants' first motion for a new trial the eighth assignment of error was stated as follows (transcript, page 37):

> Eighth error of fact in this, to wit, that the court finds in its Finding VI that the *Future City* and barges comprising her tow were all stanch, sound, and seaworthy, and that the *Future City* was amply powerful and able to handle her said tow under any and all circumstances arising in the navigation of the Mississippi River, whereas, in truth and in fact, said *Future City* did not possess sufficient power to handle her tow in any case of emergency, and said lack of power in this respect was the direct and proximate cause of the collision. An error of fact in this, to wit, that the court failed to find as a fact that it would require the biggest part of the river for the master of the *Future City* to throw the head of his barge into the New Orleans shore so as to pass around the point at Celeste street, and that said *Future City* would, although backing at her full speed, go down the river for a distance of one-half to three-quarters of a mile before she could flip her head around, and would go down the river a distance of 1 mile before she could entirely check her headway. (See the testimony of Nicholas Beaver, the captain or master of the *Future*

> *City*, as given on page 95 of the record, questions 56 to 62, especially questions 59 and 60; and see the testimony of claimant's witness R. C. Plant, record, page 178, questions 40, 41, 42, in which the above facts are testified to by their own witness on direct examination, and which have not been contradicted or denied by anybody.)

And in the defendants' motion for a reformation of the findings the court was again requested to make this finding (transcript, p. 44), as follows:

> There should be added to Finding XVI, at the bottom thereof, the following: The said steamboat *Future City*, in descending the Mississippi River, as described in this and the other findings, would require most of the width of the river in order to throw the head of her tow in toward the New Orleans shore and straighten herself and tow up so as to descend the river in a horizontal instead of a flanking position, and the said steamboat could not accomplish this in a width of 1,000 feet. The said steam towboat, exerting all her power, would descend the stream from one-half to three-quarters of a mile before she could straighten herself up from her flanking position to a horizontal one, and would descend the river at least 1 mile before she could check her headway and begin to back upstream.

The court ignored these requests for findings, and did not pass upon them, either affirmatively or negatively. This failure to find, as requested, could not possibly have been on account of a disbelief of their

accuracy on the part of the court, since the request was founded solely upon the uncontradicted testimony of the master or captain of the *Future City* and other witnesses for the claimants. The failure of the court to find as requested, therefore, must have been because the court regarded such a finding as testimony rather than the finding of an ultimate fact. In this we submit the court erred. The court in this request is not called upon to find the evidence, but to find a fact—a potent and essential fact—which of and in itself proves the error of the court's conclusion that this towboat *Future City* had ample power to handle her tow in any and all cases of emergency arising in the navigation of the Mississippi River.

We have a stern-wheel towboat, with eight grain barges loaded to their utmost capacity, each of which was 125 feet long, 10 feet hold, and 36 feet beam, forming a mass 607 feet long and 175 feet wide, floating down the Mississippi River with the current and occupying about one-third of the entire width of the stream. In order to round the point at Celeste street she would be compelled to occupy most of the entire width of the river, and could not accomplish it in a width of 1,000 feet. Exerting all of her power this craft and her barges would descend the stream from one-half to three-quarters of a mile before she could straighten herself up from her flanking position to a horizontal one, and would descend the river at least 1 mile before she could check her headway and begin to back upstream. *Res ipsa loquitur;* and it demonstrates beyond

all necessity for argument the error of the court below in concluding that this craft had ample power to handle her tow in any and all emergencies arising in the navigation of the Mississippi River.

The master of the *Future City* of course knew and must have known, the power of his boat and what she could accomplish with the tow that he was carrying. He knew therefore that before he could straighten up his tow he would descend the river from a half to three-quarters of a mile. When he first sighted the *Atlanta*, according to the findings (Finding IX, transcript, p. 9), she was lying below him at a distance of 150 yards. This lacks 40 yards of being one-twelfth of a mile. Knowing therefore that his boat could not possibly flip herself around in less than one-half of a mile, or 880 yards, he undertakes to avoid a collision by trying to accomplish this result in less than one-twelfth of a mile, to wit, 150 yards. This not only proves the want of power on the part of the towboat to handle her tow, but also demonstrates that the collision occurred because the master of the *Future City* undertook to execute a maneuver which he knew full well could not possibly be successful because of the lack of power on the part of his tug to accomplish the maneuver in the distance between him and the object to be avoided. It would seem therefore that this silence on the part of the court and its failure to find the request asked for results in producing the opposite result to the conclusion which the court incorporates in its findings.

But not only is the want of power on the part of the *Future City* demonstrated by the facts which the court

failed to find, but even the meager facts which it has found negative the conclusion drawn on this so-called finding by the court below. Be it remembered that when the *Atlanta* was first sighted by the *Future City* she was distant 150 yards. The court finds that thereupon the *Future City* was gonged and backed with all her power and used her utmost endeavor to straighten up her tow and place it in a horizontal position broadside to the New Orleans shore. Be it also remembered that this tow and boat was only 607 feet long, and that the *Atlanta* was lying 600 feet from the New Orleans shore. Now, manifestly, if this tugboat could have succeeded in swerving the head of her tow only 7 feet she could have passed in safety between the war ship and the New Orleans shore. But though she exerted her utmost power she could not move the head of her tow 7 feet to the left in a distance of 150 yards, nearly one-twelfth of a mile, and therefore floated down upon the *Atlanta* and caused the collision. And this is the boat which the Court of Claims thinks had ample power to handle her tow under any and all circumstances.

Finding VII (transcript, p. 7) is as follows:

> The following is a diagram or map of the portion of the Mississippi River at and immediately above the barge landing of the port of New Orleans.

And following this statement there is printed a map or diagram. It will be observed that this finding of fact does not purport to be anything more than a map or diagram of that portion of the Mississippi River at

and above the landing stage of the *Future City*. It does not purport to be a correct representation, nor even a map or diagram, of the places in the river at which these war ships were anchored; and yet there are laid out in this river certain objects which presumably are anchored ships, although the finding does not so state, and although the finding makes no reference whatever to the place at which these war ships were anchored. Lest, however, this pictorial representation should deceive the eye of the court and thereby unconsciously influence its judgment, it will be necessary to briefly demonstrate the entire inaccuracy of this map or diagram so far as the objects located in the river are concerned, and which might be taken as the anchored war ships. No scale of miles is given upon this map. But if it be measured by a rule it will be found that where the first object is located, which, if it had been intended to be a representation of the anchored ships, would be the place at which the *Atlanta* was anchored, it is seven-eighths of an inch wide. The river has already been found by the court to be 1,800 feet wide at this point. (Finding IX, p. 9.) Therefore, seven-eighths of an inch would equal 1,800 feet. Measuring again from the left bank of the river to the point at the head of the first object shown on this map, which would be the *Atlanta*, we find the distance to be two-eighths of an inch from the New Orleans shore. Now, two-eighths of 1,800 feet would be 450 feet, whereas in Finding IX (transcript, p. 9), the *Atlanta* is stated to have been anchored 600 feet from the New Orleans shore, and hence if the objects

shown in this map had been intended to represent the place at which the *Atlanta* was anchored it would show that ship anchored 150 feet nearer to the New Orleans shore than she has been found to have been anchored in Finding IX. The inaccuracies of distance in the lower ships is even greater than that of the first one. It is unnecessary to pursue the matter, however, since this map or diagram does not purport to be, and is not in any sense, a diagram of the location of the war ships, and this statement is merely made to prevent a possible, though unintentional, deception.

Finding XXI. Finding XXI (transcript, p. 14) is as follows:

> Upon the arrival of the war ships in May *it does not appear* that the harbor master was notified of the fact, nor was word left at the central office that the said vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet, and was without knowledge of the places taken in the river by said war vessels.

This is the new finding which was substituted on May 14, 1900, for Finding XXIII, which had been previously filed on March 21, 1898, and which will be found in 33 C. Cls. R., pages 262, 263. Upon comparison of the two findings it will be found that the finding now under consideration is precisely the same as the last paragraph of original Finding XXIII, with the exception that the word "return" in the original finding has been altered to read "arrival" in the substituted finding, and that said substituted finding has

been preceded by the words "it does not appear." By reference to the defendants' motion for a new trial (transcript, p. 37, paragraphs 6 and 9, and p. 38), it will be found that original Finding XXIII was withdrawn by the court because it was demonstrated to be absolutely untrue, but when it was so withdrawn the last paragraph of the finding was permitted to stand without any change, except that the word "return" was altered to read "arrival." (See order of the court amending the findings filed December 18, 1899, transcript, p. 14.) Thereupon the defendants made their second motion for a new trial (transcript, p. 41, 42), in which, after reciting this amended finding, the defendants say:

> The defendants now show and exhibit unto the court that this said finding works great wrong and injustice to the United States in that the same is wholly contrary to the evidence in this case and is utterly unsubstantiated by a single syllable of testimony to that effect, but, on the contrary, as shown by the affidavits filed with and made a part of the defendants' motion for a new trial, filed on November 11, 1898, and as is shown by the further affidavit of Capt. C. M. Chester, which is filed herein and made a part of this motion as fully as though the same were incorporated herein, the said fleet of war vessels anchored in the middle of the river at the port of New Orleans in the precise manner and at the precise places designated by duly authorized and licensed pilots who had been taken on board of said vessels for that purpose,

and that said vessels remained in such position for the period of forty-eight hours and more prior to the collision with the steam towboat *Future City* and her barges, during which said time neither the harbor master nor any other person made complaint that said vessels were anchored at an improper place, or in anywise notified, requested, or required any officer of the said fleet to change such place of anchorage; and each and every of the officers of said war ships were wholly without intimation or notification or knowledge that said place of anchorage was in anywise dangerous, unlawful, or improper, nor was there anything in the physical surroundings to in anywise apprise them, but, on the contrary, every physical condition indicated that the place of anchorage was a proper and suitable place.

Upon consideration of this motion the court on May 14, 1900, withdrew all of its findings of fact and its opinion and filed new findings of fact and a new opinion. In this new finding of fact, No. XXI, the finding was preceded by the words "*it does not appear.*"

And it is submitted that these qualifying words were intended to precede and govern the entire finding, since there was no testimony whatever before the court upon which they could have made any other than a negative finding of this sort. The finding, therefore, should read and was intended to read that "it does not appear" that the harbor master was notified of the arrival of the ships; "it does not appear" that word was left at the central office; "it does not appear"

that the harbor master exercised any personal supervision over the matter of the anchorage of the fleet, and "it does not appear" that the places taken in the river by said vessels was known to the harbor master. And the reason that "it does not appear" is that the court made this finding of its own motion, without having granted a new trial, and without having given the defendants the opportunity to make it appear.

But the finding carries with it its own refutation. The office of a harbor master is located, of course, on the river front, and the duties of a harbor master, of course, necessitated his being present along the river front continuously in the discharge of his duties. It has been found by the court that these war ships were anchored in the Mississippi River, extending from Race street nearly down to Canal street, a distance of about 1 mile. The presence of a large fleet of war ships in the harbor of New Orleans is a most unusual and noteworthy occurrence. It can not be doubted that their arrival was heralded in flaming headlines by every newspaper published in the city of New Orleans, and as men of common sense and experience, this court will not doubt for a moment that the arrival of those war ships was known to every newspaper reader in that city, among whom may be reasonably classed the harbor master. It is puerile, therefore, to attempt to charge the officers of these war ships with negligently anchoring in this river by finding that "it does not appear" that the harbor master was aware of that fact. If the harbor master was not aware of it, he was prob-

ably the only person along the whole river front and probably the only newspaper reader in New Orleans who was not aware of it.

But, conceding that "it does not appear" that the harbor master possessed this information, it is equally true that "it does not appear" that he did not possess the information. "It does not appear" either one way or the other, and as a finding of fact this statement of the court is meaningless for any purpose in this case.

But even if it be conceded as a fact that the harbor master was not aware of the presence of this fleet, yet that casts no blame upon the officers in command of these ships. It was his business to know it, for, according to the court, he was employed for that very purpose. These ships arrived at New Orleans and anchored at what seemed to the officers in charge and the pilots on board as suitable places. They remained there on May 5, 6, and 7, during which time neither the harbor master nor any other person made any complaint of their place of anchorage nor ordered nor requested nor suggested that they change the same, and surely they had a right to remain there unless, except, and until they were directed by some person in authority to move their berths. The harbor master testifies, so the court says in its opinion, that he had no jurisdiction over war ships and never undertook to exercise authority over their anchorage grounds, because such ships paid no duties and came and went as they pleased. But the majority of the Court of Claims would not permit the harbor master to thus construe

the duties of his office, but proceeded to construe the duties of the office for themselves, and having arrived at the conclusion that it was the duty of the harbor master to locate the place at which these ships should be anchored they then proceeded to enter up judgment against the United States because he did not do it.

The majority of the court, in their opinion (transcript, pp. 21, 22), say:

> The chairman of the board of harbor masters, who was introduced as a witness for the Government, disclaims, or attempts to disclaim, on behalf of the board, any control over vessels of the Navy, on the ground that such vessels pay no duties and have the right to come and go as they please. Ships of the Navy have the right in time of war or peace to go anywhere in navigable water pursuant to Government orders. But in time of peace they are as much subject to the reasonable rules and regulations adopted for the safety of all the shipping using a harbor, consistent with their own safety and duty to the Government, as others. The board of harbor masters at the port of New Orleans had *power* and *authority* to prescribe where vessels *might* lie in the harbor. An ordinance of this kind, embodying other similar regulations, is not in conflict with any law of Congress regulating commerce, and is therefore valid. (*Owners of brig James Gray* v. *Owners of ship John Frazer*, 21 How., 184.) The findings show that the harbor master exercised no personal supervision over the matter of the anchorage of the fleet

> [it is submitted, however, that the findings do not show anything of the sort] and was without knowledge of the places taken in the river by the fleet; but they also establish that it does not appear that upon the arrival of the war vessels in the harbor that the harbor master was notified of the fact, nor was word left at the central office that the said vessels had arrived, pursuant to the rules regulating the anchorage of vessels in the river. [It is submitted that it does not appear that he did not do it, either.] The commander of the fleet may not have known what the regulations of the port were, but it was his duty to inquire; and if he anchored his ships contrary to the regulations existing for the anchorage of said vessels in the harbor, the defendants assumed the consequences.

It will be seen, therefore, that the court has determined that it was the duty of the harbor master to do something which that officer says it was not his duty to do, and that the court has placed upon the United States the sole responsibility in damages for a failure on the part of the harbor master to do that which they think he ought to have done. It will likewise be observed that the whole judgment of the court is based upon the assumption that there was a law or regulation requiring the masters of vessels to consult the harbor master before coming to anchor in the port of New Orleans, and requiring that officer to designate such place of anchorage. This assumption, and consequently the whole argument of the court which is

based upon it, is absolutely without foundation. *There was no law, neither State nor municipal, nor any harbor rule or regulation, nor has any such been found by the court which required vessels in coming to anchor in the harbor of New Orleans to report to anyone, nor to obtain any person's consent to anchor at any particular place, nor requiring the harbor master to designate the place at which ships should anchor in that port, nor prohibiting them from anchoring at any particular place in said port; and in anchoring where they did the officers of these ships of war did not violate any State or municipal law nor any regulation or rule of the port.*

This assertion will be fully demonstrated under division IV of this brief when we come to deal with the question of negligence on the part of the war ships. It will not, therefore, be duplicated at this point.

Even, however, if it were conceded that any such harbor regulation did exist, yet, if the person charged with the enforcement of this regulation did not enforce it, but permitted ships to anchor and remain at anchor without requiring them to remove their berths, there was no fault on the part of the commander of the ships in anchoring at such place, and no court can be more rigid in the enforcement of a harbor regulation than the authorities whose duty it was to enforce it. This rule is clearly laid down by this court in *The Frazer* (21 How., 184, at p. 188), wherein this court, speaking through Mr. Chief Justice Taney, said:

> Yet, upon the evidence before the court, we do not think the *James Gray* ought to be regarded as in fault by remaining at anchor in

the harbor beyond the time limited in the city ordinance. She was seen there by the harbor master day after day without being ordered to depart; nor did he seek to inflict the penalty. The object of this regulation was obviously to prevent this thoroughfare from being crowded by vessels at anchor, which would make it inconvenient or hazardous to vessels coming into port. And from the conduct and testimony of the harbor master it may be fairly inferred that this regulation was not strictly enforced when the thoroughfare was not overcrowded, and that single vessels were sometimes permitted to remain beyond the time fixed by the ordinance without molestation from the city authorities. And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbor master saw her lying there for three days beyond the limited time without even remonstrance or complaint. *He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities it ought not to be more rigidly interpreted and enforced by this court.*

The Court of Claims, however, reverses this rule and holds the Government responsible for the harbor master's negligence.

To the same effect is *The Russia* (3 Benedict, 471, Fed. Cas., No. 12168), where it was held that a vessel which lay at anchor for twenty-four hours preceding a collision, without notice from the harbor master to move, is not precluded from recovering for injuries resulting

from the collision merely because the harbor regulations forbade ships from anchoring at that point, as the failure of the harbor master to notify the vessel to move was a waiver of the regulation. In delivering the opinion of the court Judge Blatchford said:

> There is nothing to show that the *Figlia Maggiore* was anchored at an improper place. On the evidence she was anchored in a customary place of anchorage and in a place not forbidden by any State law or city ordinance. As to any general regulation made by the harbor masters, it is not shown that those charged with the anchorage or management of the *Figlia Maggoire were notified of any such regulation*, or had been warned not to allow their vessel to remain where she was. As she had taken anchorage in a place not shown to have been in itself unsafe and improper, as respected the navigation of other vessels, a failure on the part of the proper harbor master to notify her to remove from such anchorage must be regarded as a waiver in her favor of at least any general regulation *of which she was not in fact notified*, which forbade her anchoring at the place where she was anchored.

The Court of Claims also reverses this rule and holds that although he had no knowledge of any such regulation in the port of New Orleans, yet it was his duty to inquire about the matter, and that the commodore of this fleet was guilty of negligence in not so doing. The true rule, as stated by Judge Blatchford, is that it was the duty of the harbor master to notify the commodore of the fleet and to apprise him of any rule

on the subject which may have existed, and that if he did not do so nor require the vessel to move from the berth which he had selected his negligence can not be charged against the anchored vessel.

Finding XXIII. This finding is as follows:

> The said collisions were the result of negligence on the part of the officers in command of the said United States vessels in bringing them to anchor in improper and unusual positions, *and in causing them to be anchored on swinging chains as aforesaid.*

That portion of the finding which is here printed in italics is improperly retained in the finding. There is no "aforesaid" upon which the statement can be based, inasmuch as the findings which charged these ships with being anchored on a swinging chain and swinging in and out at anchor, and charging the *Galena* with sheering in and striking barge 68, have all been withdrawn by the court and totally eradicated from the case. This sentence, therefore, is a mere meaningless inadvertence and has no place in the finding whatever. And likewise the sentence on page 20 of the opinion, at the beginning of folio 23, where the court says that "all the ships were anchored with a single chain and swinging to some extent." This sentence in the opinion, like the sentence at the bottom of Finding XXII, is based upon the findings to that effect which have been withdrawn and eliminated from the case. This sentence in the finding and in the opinion of the court is due to inadvertence, owing to the failure of the court to correct the phraseology of its findings and opinion

to conform with the changed condition of things after the other findings had been withdrawn.

In the second place, this finding is not a finding of fact at all, but a mere conclusion of law and fact drawn by the law from the serial facts and conditions attendant upon and conducing to the collisions. If the statements in this finding were properly a finding of fact, then the finding, of and by itself, fully meets the requirements of the special act and disposes of the whole case, that act providing that "no judgment shall be entered unless it affirmatively appears from the evidence adduced that the collision was the result of negligence on the part of the officers in command of said vessels of war;" and the court has been at infinite pains to perform a great amount of unnecessary labor. If the statement that this collision was the result of negligence on the part of the officers of the ships of war is to be regarded as a finding of fact, then there is an end of the case, and it was totally unnecessary to find any other fact whatsoever. But it is not a finding of fact in any sense of the word. Negligence is always a mixed question of law and of fact. In Beach on Contributory Negligence (3d ed., sec. 444), the matter is put thus:

> As a general proposition of law, it is agreed that cases of negligence present a mixed question of law and fact, by which is meant to say, that in an action in a court of justice in which the negligence of either plaintiff or defendant is an issue, or the issue, it devolves upon the court to say, as a matter of law, what is, or

> amounts to, negligence, and upon the jury to say, as a matter of fact, in the light of the instructions from the bench, whether or not in the particular case at bar the facts as proven to their satisfaction warrant the imputation of negligence. In other words, the court tells the jury what negligence is, and the jury tells the court what the facts of the case show upon the question of negligence; the judge defines negligence in the charge, and the jury apply the definition to the facts in the verdict. Negligence, says the supreme court of California, is always a mixed question of law and fact, and when the facts are doubtful they must be submitted to the jury under such instructions from the court as will enable them to apply the law to the facts. An uncounted multitude of authorities might be cited in support of this elementary proposition. [The author cites a multitude of cases in support of the text.]

Dr. Wharton, in his discussion of this subject, says (Wharton on Negligence, 2d ed., sec. 420):

> Negligence, we must remember at the outset, is not a fact which is the subject of direct proof, but an inference from facts put in evidence. A witness is asked, not whether A was negligent at a particular junction, but what were the facts of the case, and from these, negligence, if there be any, is to be inferred.

See, in accord, Thompson on Negligence, 1235, section 10; Wells's Law and Fact, sections 263–265; Holmes's Common Law, 120 et seq.

In this connection the recent decisions of this court

in the case of *Leovy* v. *United States* (177 U. S., 621) and *United States* v. *Gleason* (175 U. S., 608), which were cited and quoted from in this brief under the comments upon Findings VII, are again directly in point and are conclusive of the contention here made. In the Leovy case the court held that what constituted a navigable water of the United States was a mixed question of law and fact, and that this court was not precluded by any finding of a jury upon that point from examining the facts for itself, the court, through Mr. Justice Shiras, saying:

> We can not accept the contention of the Government's counsel that because the jury was left to determine whether the pass was in fact navigable, and found the defendant guilty, the decision of the jury is binding upon the appellate court. We think we have a right to consider under what instructions and definitions, given by the trial court, the jury found their verdict.

And so in the case of the *United States* v. *Gleason* the court held that a so-called finding of fact on the part of the Court of Claims, to the effect that no decision was rendered by the engineer in charge of the work upon the question of whether the contractors had been prevented from completing the work under the contract by reason of ice, freshets, or the force and violence of the elements, was not a finding of fact at all, but a mere conclusion on the part of the Court of Claims, resulting from an improper construction of the contract on their part. In each case this court ex-

amined the facts for itself, drew its own conclusions, and refused to be precluded by the conclusion of the Court of Claims, albeit stated in the guise of a finding of fact.

IV.

THERE WAS NO FAULT OR NEGLIGENCE ON THE PART OF THE UNITED STATES SHIPS OF WAR.

It has already been shown that the only negligence attributed to the ships of war is as to the *place* at which they were anchored, the charge of negligence in anchoring upon a single chain, and the charge that the *Galena* sheered in and struck barge 68 having been withdrawn and totally eliminated from the present findings of fact. It is nowhere alleged or found that the ships were not provided with suitable anchors, proper lookouts, or a full complement of officers and men, vigilant in the performance of their respective duties; nor is it charged or found that chain was not veered in an effort to avoid the collision when the same became imminent, or that the ships omitted any action or precaution calculated to avoid the collision. The only charge and finding of negligence is that, being anchored 600 feet from the New Orleans shore, they were too close to said shore and in the track of this tow, and hence they are solely to blame for having been run into by said tow. This decision is rested by the majority of the court (Peelle, J., dissenting) upon the following propositions:

First. Because the commander did not, before anchoring, report his arrival to the chairman of the board of harbor masters or at the central office, as required

by rule 7 of the harbor masters' regulations. (Finding XX, transcript, p. 13.)

There are many conclusive answers to this proposition.

In the first place, an examination of this rule 7 discloses the fact that it has no relation whatever to a vessel seeking anchor. It is as follows (transcript, p. 13):

> All vessels arriving at this port shall notify the harbor master of the district or leave word at the central office, where a place of *landing* will be designated; otherwise (they will be) removed at the expense of the vessel.

In other words, a ship entering the harbor and seeking a *landing*, i. e., *a wharf or pier at which to receive or discharge her cargo*, must leave word at the central office and be assigned to a landing, a wharf *of the levee*, otherwise he is liable to be removed to a proper landing at his own expense. This has no sort of reference to a vessel seeking anchor and not desiring to land or to receive or discharge a cargo. This is further shown by the context, rule 1 being as follows (transcript, p. 13):

> The harbor masters have authority by law to regulate, *moor*, and station all seagoing or coasting vessels *at the levee* and to remove them from time to time to make room for others, and of the degree of accommodation which one vessel shall afford another, the harbor master is constituted the sole judge.

In the second place, *no law, either State or municipal, nor any harbor rule or regulation existed, nor has any such*

been found by the court, requiring vessels desiring to anchor in the harbor of New Orleans to report to any one, or to obtain any person's consent to anchor at any particular place, or require the harbor master to designate the place at which ships should anchor in the port, or prohibit them from anchoring at any particular place in said port; and in anchoring where they did, the officers of these ships of war did not violate any State or municipal law nor any regulation or rule of the port.

Conceding that the harbor master, *if he had chosen to do so*, could lawfully have required these ships to have anchored at a place designated by him, still there is no law or regulation *requiring* him to do so, or *requiring* the ships to report themselves for that purpose. The officers of these ships anchored at a place which they and which the pilots which they had taken on board regarded as safe and proper. They remained there for three days. The harbor master did not complain nor tell them to move nor point out another anchoring ground. Evidently he also regarded the anchoring ground selected as safe and proper. If he failed to exercise a discretion vested in him by law, or even if he failed to discharge a duty imposed upon him by law, then the officers of the ships were certainly without blame, and damage, if any, should have been rendered against the harbor master or the State, whose officer he is by appointment from the governor.

In Finding XIX (transcript, p. 12), the court finds:

> Among the duties with the performance of which the aforesaid board of harbor masters are

> charged by the laws of the State of Louisiana is that of "regulating and stationing all vessels in the stream of the river Mississippi, within the limit of the port of New Orleans and at the levees thereof." The said laws of Louisiana further provide for the imposition of a fine of $50 upon any master or other person who shall oppose or resist any harbor master in the execution of the duties of his office.

The court below did not disclose its authority for this finding, but it will be found in Voorhees's Rev. Stats. La., 2d ed., p. 254, sections 1679 to 1684.

Section 1679 provides for the appointment of a board of five harbor masters for the port of New Orleans, with power to remove from office any member of said board upon satisfactory proof of negligence, incapacity, or misconduct.

Section 1680 provides for bond to be given by these officers.

Section 1681 provides as follows:

> Said harbor masters, under the rules and regulations to be established by the board, shall have authority to regulate and station all vessels in the stream of the river Mississippi within the limits of the port of New Orleans and at the levees thereof, and remove from time to time such vessels as are not employed in receiving and discharging their cargoes to make room for such others as require to be more immediately accommodated for the purpose of receiving and discharging their cargoes. And as to the fact of any vessel being fairly and *bona fide* em-

ployed in receiving or discharging, the said harbor masters are constituted the sole judges. And further the harbor masters shall have authority to determine how far and in what instances it is the duty of the master and others having charge of ships and vessels to accommodate each other in their respective situations. And if any master or other person shall oppose or resist any harbor master in the execution of the duties of his office, he shall, for each offense, forfeit and pay the penal sum of fifty dollars, to be sued for by the treasurer of the Charity Hospital of the city of New Orleans for the use of said hospital: *Provided, however,* That if any person shall consider himself aggrieved by the decision of any individual harbor master, he shall be at liberty to appeal to the board, and their concurrence shall be given thereto before such decision is carried into effect.

Section 1682 provides that—

> The board of harbor masters shall have the power to demand and receive from the commanders, owners, consignees, or either of them, of any vessel that may enter the port of New Orleans and load, unload, or make fast to the levees within said limits at the rate of one and one-half cents per ton, to be computed from the tonnage expressed in the register of said vessel.

Section 1683 makes it the duty of the harbor masters to superintend and enforce all the laws of the State and all the laws of the city of New Orleans for the preventing and removing of nuisances in or upon the levees of the city.

Section 1684 provides for the location of the office of the board of harbor masters and for their clerks.

It will be seen, therefore, that there is no law which requires the harbor master to locate the anchorage ground of any ship in the port of New Orleans, or which requires any vessel to report to the harbor master for that purpose, or which forbids them to anchor at any particular place in the port of New Orleans. Notwithstanding this fact, however, the Court of Claims has assumed directly the contrary, and upon this erroneous assumption has built up a liability against the United States founded, first, upon the supposed omission on the part of the commander of this fleet to perform a legal duty, and, second, upon the assumed negligence on the part of the harbor master for failure to perform his duty. The majority of the court say (opinion, pp. 21, 22):

> The chairman of the board of harbor masters, who was introduced as a witness for the Government, disclaims or attempts to disclaim on the part of the board any control over vessels of the Navy, on the ground that such vessels pay no duties and have the right to come and go as they please. [In this contention, it is submitted, the harbor master is correct and the court is wrong. (See Voorhees's Rev. Stats. La., sec. 1682.)] * * * The findings show that the harbor master used no personal supervision over the matter of the anchorage of the fleet and was without knowledge of the places taken in the river by the fleet; but they also establish that it *does not appear* that upon the arrival

> of the war vessels in the harbor the harbor master was notified of the fact nor word left at the central office that the said vessels had arrived, pursuant to the rules regulating the anchorage of vessels in the river. The commander of the fleet may not have known what the regulations of the port were, but it was his duty to inquire, and if he anchored his ships contrary to the regulations which existed for the anchorage of all vessels in the harbor, the defendants assumed the consequences.

The complete answer is that the commander of the fleet did not anchor contrary to regulations, for the very simple reason that there were no regulations on the subject. This assertion on the part of the court is absolutely without foundation either in fact or in law. The harbor master says he had no authority over naval vessels, that they paid no duties, that he had no authority to collect duties from them, and that they were entirely at liberty to go and come as they pleased. The Court of Claims, however, says that the harbor master is mistaken. It proceeds to cast upon the harbor master a responsibility which he had never exercised and which he did not suppose he had the power to exercise, and the court below having created this duty on the part of the harbor master proceeds to damnify the United States in the sum of $20,000 because the harbor master did not perform a duty which the Court of Claims says he ought to have performed. This is in the very teeth of the decision of this court in the case of the *Fraser* (21 How., at p.

188), where this court, speaking through Mr. Chief Justice Taney, holds:

> This court will not enforce an ordinance more strictly than the local authorities enforce it whose duty it is to see that it is obeyed.

In that case a vessel remained at anchor in a harbor beyond the time limit in the city ordinance. The harbor master, however, did not order her to depart nor seek to inflict the penalty provided in the ordinance. This court held that from the conduct of the harbor master it might be inferred that this regulation was not strictly enforced and that vessels were permitted to remain beyond the time fixed by the ordinance without molestation of the authorities, and says:

> And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbor master saw her lying there three days beyond the limited time, without even remonstrance or complaint. *He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities it ought not to be more rigidly interpreted and enforced by this court.*

To the same effect is the *Russia* (3 Benedict, 471–475), wherein Judge Blatchford, in delivering the opinion of the court, said:

> As to any general regulation made by the harbor masters, it is not shown that those charged with the anchorage or management of the *Figlia Maggiore* were notified of any such

> regulations or had been warned not to allow their vessel to remain where she was. As she had taken her anchorage in a place not shown to have been in itself unsafe or improper as respected the navigation of other vessels, a failure on the part of the proper harbor master to notify her to remove from such anchorage must be regarded as a waiver in her favor of at least any general regulations of which she was not in fact notified, which forbade her anchoring at the place where she was anchored.

These two decisions establish the rule to be precisely the contrary to that which the Court of Claims holds it to be. First, that it is the duty of the harbor masters to notify a shipmaster of the regulations of a port concerning a certain anchorage ground and not the business of the shipmaster to inquire concerning it of the harbor master; second, that if a vessel anchors at an improper or unlawful place it is the duty of the harbor master to notify her of that fact and to require her to move to some place which he considered to be proper and lawful, and if he fails to do so no blame can be attached to the shipmaster for remaining there; third, that if a harbor master or others in authority are lax or careless in their enforcement of harbor regulations the courts will not enforce such regulations with any more strictness. Every single principle laid down in these decisions is overturned and set at naught by the decision of the majority of the Court of Claims in the case at bar.

The second reason assigned by the majority of the court below for holding that these ships of war

anchored in improper places is the allegation that they where anchored too close to shore and too high upstream; and the court thinks such positions were dangerous ones to "*unwary shipmasters entering the harbor from above or below.*"

The court says (transcript, pp. 19 and 20):

> If the anchorage selected was safe and proper for two days, it was so for a longer time, and if there was nothing improper in the selection, then vessels of any kind had the right to anchor in the same positions and places at every opportunity. The *Richmond* must have been very much in the way of all vessels passing to or from the city side of the river with knowledge of her position, while with those without knowledge of it, or to those navigating in the fog, her position was extremely dangerous. No tow could make a landing in that vicinity while the *Richmond* remained in her position. The entire fleet was a source of danger to *unwary shipmasters coming into the harbor, both from above and below.* The *Atlanta*, just below the head of Celeste street, was more directly in the way of descending boats than the others.

The *Richmond* according to the findings (Finding IX, p. 9) must have been at least 500 feet from the barge landing, since this is the least distance found. There was, therefore, plenty of room for the tows to pass between her and the shore provided they did not arrogate to themselves the right to occupy one-third of the whole river's width to do it. It has been shown that

she lay in this position for three days. The port of New Orleans at this point is a crowded harbor. Craft of all sorts must have passed and repassed her at that point every day. Besides, there was no collision with the *Richmond*, except after the tow of the *Future City* had been all broken to pieces and were floating down toward the Gulf of Mexico. The collision with the *Atlanta* demonstrates that it would have occurred even if the *Richmond* had been very much farther from the New Orleans shore than she was.

It is indeed a strange doctrine and one which possesses at least the merit of complete originality, which the Court of Claims here lays down in maritime law, to wit, that it is negligence *per se* for any ship to anchor at any place where it may possibly be in the way of an *unwary* shipmaster coming in or going out of a port. Webster defines the word "unwary" as follows: "Not vigilant against danger; not cautious; unguarded; precipitate." Until informed to the contrary in the majority opinion of the Court of Claims in this case, we shared in what we think is the universal belief, that it was the duty of shipmasters to be wary and not unwary, to be vigilant against danger instead of careless thereof, to be cautious instead of incautious, to be guarded instead of unguarded, to be careful instead of precipitate, and that where a shipmaster was not vigilant against danger, nor cautious, nor guarded, but reckless and headlong, he must bear the responsibilities of his own negligence We entirely agree with the Court of Claims that these ships were

objects of danger to an *unwary* shipmaster—so is a light-house or a river bank or a coral reef, but we do not share in the conclusion of the Court of Claims that the United States is to bear the results of the unwariness of the master of the *Future City*.

Aside from the fact that there was no law, either State or municipal, nor any regulation of any board of harbor masters requiring these vessels to anchor at any particular place, or requiring them to report to any officer of the port for the purpose of having an anchorage ground assigned to them, and aside from the fact that they remained at their berths for three days without molestation, protest, or objection on the part of the harbor master or any other person in authority, it was perfectly proper, as a matter of fact, for these ships to anchor where they did, inasmuch as plenty of room was left for vessels to pass on either side of the anchored ships, if navigated with any regard for the rights of others. They could not foresee, nor were they required to foresee, that some unwieldly mass would float helplessly down the stream, demanding from one-third to one-half of the entire width of the river, with no power to change its course or to check its headway.

In the case of the *Ogemaw* (32 Fed. Rep., 920, 922, 924), it was held that a vessel anchored in about the middle of a stream 1,600 feet wide was properly anchored. In that case, Judge Dyer said:

> If the *Richards* was half a mile below the middle ground there could have been no difficulty, in the exercise of proper watchfulness

and care, in passing her safely on the American side, even with as many vessels as the *Ogemaw* had in tow. If she was lying as far down the river as the respondents say she was, the facilities for shaping the course of the tow after leaving the middle ground so as to pass the *Richards* on the American side were very greatly increased. It is evident, as was observed in the case of *Wells* v. *Armstrong* (29 Fed. Rep., 218), that the fault of the master of the *Ogemaw* was in "not allowing a sufficient margin for safety amid the contingencies of navigation, and not taking in time the decisive measures at his easy command." * * * The duty to keep out of the way embraces the duty to keep away by a prudent and safe margin, having reference to all the contingencies of navigation. (The *Aurania and Republic*, 29 Fed. Rep., 125.) A steamer bound to keep out of the way must, at her own peril, shape her course for a safe margin against the contingencies of navigation and the effect of tide currents. (The *City of Springfield*, 29 Fed Rep., 923.) * * * Undoubtedly, as was said by Judge Longyear in the case of *The Masters and Ragnor*, *supra*, there are safer places for vessels to lie at anchor, and where there would be a less obstruction to navigation. But no law or custom is shown prohibiting vessels from anchoring at the place where the *Richards* was lying, and her legal right to lie there must be conceded. * * * In the case of *The Planet* (1 Brown, Adm., 124) it was held by Judge Wilkins that it was proper for a vessel to lie at anchor in the St. Clair River 1,000 feet from the Canadian shore and more than 300

feet from the American shore, even with her sails up and when there was a puffy wind, there being, as was said by the court, ample room for other vessels to pass on either side.

If there is no rule or custom requiring a vessel to bring up out of the fairway she may anchor there, although directly in the track of ships. Thus a vessel brought up in the Mersey directly in the track of the ferry steamers was not held to be in fault for lying there. *The obligation of a ship under way to keep clear of another at anchor applies, although the ship at anchor is in an improper berth. And a vessel brought up in a berth which is improper only in the sense that it is an exposed and dangerous position does not thereby contribute to a collision caused by another ship negligently driving into her.*

The case of *Culbertson* v. *Shaw* (18 How., 585, 586, 587) is to the same effect.

In the case of *The Indiana* (Abbott's Admiralty Reports, p. 330), where a collision occurred at night near the middle of the Hudson River, it was held that the taking up of anchorage in the middle of the river was not an act of culpable negligence on the part of the schooner.

In the case of *The Coulberg* (3 Woods Cir. Ct., Dist. La., p. 32) where a tug with two tows, descending the Mississippi River, caused one of her tows to collide with another tug anchored within 500 feet of the bank, at a place where the river was three-quarters of a mile wide, it was held that these facts threw the fault on the descending tug, and that the anchored tug was anchored in the proper place. And in the case of *The*

Master (Brown's Adm., 342), it was held that a vessel was not in fault for anchoring in the St. Clair River below Port Huron, where plenty of room was left on both sides for vessels to pass, the court holding that anchorage in a narrow channel where vessels are constantly passing is not improper if sufficient room is left for vessels to pass. (See in accord 3 Hughes, 480; Fed. Case, 9433. 10 Benedict, 520; Fed. Case, 4241).

In the case of the *E. A. Parker* (10 Benedict, 520) a vessel was held not at fault for anchoring in an exposed situation within 300 feet of the end of a pier where vessels were in the habit of anchoring, notwithstanding the fact that it was contrary to the harbor regulations.

In Spencer on Marine Collisions, section 110, it is said—

> The mere fact of anchoring in a dangerous situation is not of itself sufficient to charge a vessel with negligence, unless the situation is such that collision is reasonably to be apprehended in the ordinary course of navigation. The mere fact that the situation is so exposed that injury *may* be received through some mischance or mistake of navigation is not sufficient to render such anchorage negligence *per se*. The situation must be such as to make collision reasonably to be apprehended as liable to occur. In the absence of local regulations vessels have the right to anchor in harbors wherever convenience suggests so long as they do not unnecessarily obstruct navigation and so long as they observe precautions to guard against injury proportionate to the exposed situation.

citing *The Mary Powell*, 31 Fed. Rep., 622; *Brush* v. *The Plainfield*, 2 N. J. L., 331; *The Gregory*, 2 Benedict, 166. And again, in section 111, the same author says—

> However much more prudent it may be for a vessel coming to anchor to withdraw entirely to one side of the channel, there is nothing in the general maritime law requiring it to do so, the only restriction imposed by law being that unusual watchfulness and care are required where the situation is an exposed one.

citing a multitude of cases in note 1.

These cases establish the rule to be, first, that if there be no State or municipal law, nor regulation of a port, prohibiting a vessel from anchoring at any particular place, she has a perfect right to anchor there; second, that it is not negligence *per se* to anchor in an exposed or dangerous place; third, that it is not negligence *per se* to anchor in the fairway of other vessels, and that it is not negligence at all to do so if room be left for other vessels to pass on either side; fourth, that the obligation of a ship under way to keep clear of one at anchor applies, although the ship at anchor is in an improper berth; fifth, that a vessel brought up in a berth which is improper only in the sense that it is an exposed and dangerous position, does not thereby contribute to a collision caused by another ship negligently driving into her.

Every one of these cardinal principles of maritime law has been overruled and set at naught by the majority of the Court of Claims in the case at bar.

The attention of the court is again called to three

paragraphs on page 20 of the majority opinion in this case, which have absolutely no finding of fact to support them. The portion of the opinion alluded to is as follows:

> All the ships were anchored with a single chain and swinging to some extent.
>
> When war vessels visited the port of New Orleans on occasions previous to the collision, they anchored from Canal street down to the custom-house, or in that vicinity, but on no occasion or at any time were they ever anchored just below the bend of the river near Celeste street, as in this instance.
>
> Immediately below and under the point on the Algiers side of the river, above which there was a convenient, safe, and proper place for vessels to anchor, there is a strong eddy. Vessels coming from the south all come through that eddy, striking the current at the point; then they headquarter over to the city side, close along the shipping, to make their landings.

There is not a single finding in the court's findings of fact to support the statements here made in its opinion. These statements are repetitions of former Findings XVII and XVIII, which, on May 14, 1900, the court withdrew, suppressed, and entirely eliminated from this case, and which do not appear in the findings of fact in this court in any shape whatsoever. The court has *unwarily* left this statement in its opinion by neglecting to so revise and edit its opinion as to make it conform with its findings of fact. In proof of this statement see Findings XVII and XVIII, 33 Ct. Cls. R.,

page 260. The object of these findings and the purpose of the court in quoting them in its opinion was to show that this fleet of war vessels was anchored at a place where no such ships had ever been anchored before and where masters of other craft would not expect to find them, and hence that they were anchored in unusual places; and also for the purpose of showing that they were in the eddy, and therefore in the track of steamers coming up as well as those going down the Mississippi River. The statements contained in these findings were shown to the court to be untrue in the defendant's motion for a new trial, and were accordingly withdrawn and suppressed from their findings of fact entirely May 14, 1900, though they *unwarily* omitted to withdraw and suppress them from the opinion which they promulgated on the same date.

The third reason assigned by the court below for thinking that these ships were anchored in improper places is the statement that they were in the track of tows descending the Mississippi River in a proper manner.

It has already been shown that there was plenty of room to pass on either side—600 feet on the left and 1,200 feet on the right. As a matter of fact, then, they were not in the track of tows. This tow was only 175 feet wide and 607 feet long. There was, therefore, plenty of room to pass, even in a horizontal position, or in a flanking position, if the *Future City* had had power to alter her course 7 feet in the space of 150 yards. This lack of power was not the fault of the officers of the men-of-war.

As a matter of law these vessels were not anchored in the path of tows descending the Mississippi River, but on the contrary the tow was out of her proper course. It is the custom of steamers navigating Western rivers, including the Mississippi, for descending vessels to navigate in midstream as nearly as possible, and for ascending vessels to navigate inshore; the reason being that the steamer navigating inshore is less impeded by the current than if in midstream, while the force and direction of the current are to the advantage of the one descending. (*The Natchez*, 1 Newb., 489; *The Relief*, O. C. L., 104; *The Bridgeport*, 1 Ben., 65; *Shirley* v. *The Richard*, 2 Woods, 58; *The Scranton*, 5 Blatch., 400; *The Belle*, 34 Fed. Rep., 669; *Barrett* v. *Williamson*, 4 McLean, 589.) The custom of navigation on Western rivers, including the Mississippi, requires a descending boat to run down the channel, where it finds the strongest current and the deepest water, and the ascending boat to keep as close as possible to shore where the current is less resistful. (*Key* v. *The Ambassador*, 1 Bond, 237.) Neglect of this custom of navigation, it has been held, will render the one neglecting it, if such neglect produces injury, liable in damages. (*Sinnot* v. *The Dresden*, Newb., 474; *Shirley* v. *The Richard*, 2 Woods, 58.) Although the usual rule requires a descending boat to keep in the middle of the river, it may hug the shore so long as it does not interfere with the rights of others, and if an ascending boat is met, and indicates its disposition to hold the shore, the descending boat must give way. (*Thorp* v. *The Defender*, 1 Bond, 397.)

The attempt of the court below to ingraft an exception upon this rule in favor of tows is certainly without reason or authority to support it. The court does not cite a single precedent in support of its position. On the contrary, this court has expressly held that the rule is applicable to tows. The case of *Snow* v. *Hill* (20 How., 543–549–550) was a case where a tug was descending the Mississippi River with a vessel fastened to each side and another at the stern, and a collision ensued, between one of the vessels thus lashed and a steamer ascending the river. The court held that the towboat was in her proper place in the middle of the river, and that the collision was due to the negligence of the ascending steamer in attempting to appropriate to herself, the position properly belonging to the tow. The court, through Mr. Justice McLean, said, after showing the inevitable conflict of testimony in all admiralty causes:

> Some eight or ten witnesses called in behalf of the claimants, being on board the *Star* towboat, or one of the boats fastened to it, and several of them witnessed the collision, a part of whose testimony is above stated, and they all conduce to establish the allegations in the libel. *They show that the towboat was in her proper course in the middle of the river*, or rather nearer to the western than the eastern shore, and this all the witnesses admit was the usual and proper course. * * * More than this could not be done nor required of the towboat with her towage. *Being in her right position*, the *Star* had no reason to apprehend a collision

> until the danger became imminent. And when this was apparent, nothing more could be done by the towboat than was done. It would be a strange rule of navigation to require a *boat descending in the middle of a river* more than twenty-four hundred feet in width to keep out of the way of a vessel ascending the river close to the shore, a thousand feet from the descending boat, which should change its course to a direction across the river, *out of its proper course*, and with the view of crossing the bow of the descending boat.

This case was decided in 1857. It was then the custom for tows to navigate the middle of the river, and that custom received the sanction of this court. Since when was it changed, and if so, by whom and by what authority? The court below does not inform us, nor does it give us a single instance in which this radical departure from the customs of navigation has ever been recognized or sanctioned by any court—except itself. In the case of *United States* v. *Buchanan* (8 How., 83, at p. 102), this court laid down the following rules and definitions as to usage and custom:

> On the subject of a usage or custom, attempted to be proved, to overturn these principles and decisions, it seems to us that the judge should have ruled that a usage ought not to be permitted to be set up where a rule, as here, is not doubtful, but settled. (*Brown* v. *Jackson*, 2 Wash., C. C., 24; 6 Binney, 417.) And that a usage or custom, when admissible,

> must, in order to be valid, be ancient, reasonable, and generally known (3 Wash., C. C., 149), and also be certain. (*United States* v. *Duval*, Gilpin, 372.) * * * There is a very good description of a custom or usage in c. 1, art. 3, of the civil code of Louisiana: "Customs result from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

How imperfectly the findings in the case at bar meet the requirements of such a definition of usage or custom as is given here, or of any legal view of a valid usage, is so obvious as not to need further explanation.

In every aspect of the case, therefore, it is submitted that these war ships were anchored in proper places both in fact and in law, and that no negligence whatever can be attributed to the officers of said ships for anchoring at those places.

V.

THE COLLISIONS WERE THE PROXIMATE RESULT OF NEGLIGENCE ON THE PART OF THE *FUTURE CITY* AND BARGES AT VERY LEAST, THE NEGLIGENCE OF SAID *FUTURE CITY* AND BARGES CONTRIBUTED TO SAID COLLISION; IN EITHER OF WHICH EVENTS NO JUDGMENT CAN BE RENDERED AGAINST THE UNITED STATES.

The warships being at anchor, and, we submit, lawfully and properly at anchor, every presumption arises in their favor and against the vessel in motion. The burden of proof is always on the moving craft to prove by clear and affirmative evidence that the

collision was not due to the persons navigating the moving craft, the presumption being always against them. This is true (*a*) under the general principles of maritime law, and (*b*) is emphasized by the provisions of the special act under which the Court of Claims was given jurisdiction to hear and determine this case.

(*a*) In the case of the *Lady Franklin* (2 Lowell, 220), Judge Lowell of the Massachusetts district said:

> That a vessel which is in motion is bound to avoid one lying at anchor is one so plainly founded in reason that there can never have been different opinions about it. (See in accord *The Oregon*, 158 U. S., 186–192.)

In the case of the *New York and Virginia Steamship Co.* v. *Calderwood* (19 How., 241, at p. 246) this court said:

> This court has decided that neither rain nor the darkness of the night nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished and conducted with caution, will excuse the steamer from coming into collision with a barge or sailing vessel where the barge or sailing vessel is at anchor.

In the case of *The Ogemaw* (32 Fed. Rep., 920, at p. 921) Judge Dyer, of the Wisconsin district, said:

> As the collision occurred with a vessel at anchor, the steamer is *prima facie* liable and can only relieve herself by showing that the accident was inevitable or was caused by the

culpable negligence of the schooner. (Citing *The Carroll*, 8 Wall., 304; *The Adams*, 1 Cliff., 413; and authorities cited.)

See in accord *The Gregory*, 6 Blatch. 528; *The Ehrman*, 97 U. S., 309, at p. 315; *The Batavia*, 40 Eng. Law and Eq., 25; *The Louisiana*, 3 Wall., 164; *The Girolamo*, 3 Hagg. Eng. Adm. R., 169; *The Granite States*, 3 Wall., 310; *The Wanata*, 4 Benedict, 314; *The Bridgeport*, 14 Wall., 119.

This general presumption of maritime law is reversed by the Court of Claims in its majority opinion. The court first assumes that these ships were anchored in an an unlawful situation and then proceeds to hold that being so anchored the burden of proof is upon them to show that the collision did not occur because of such unlawful anchorage. Of course the word unlawful in this connection necessarily means, and can not mean anything else, that the ships were anchored at some place where they were positively prohibited by law from anchoring; otherwise it could not be an unlawful anchorage, although it might have been an exposed or dangerous place. It has already been demonstrated that these ships were not anchored at any place where they were prohibited from anchoring by any law either State or municipal, or by any rule or regulation of any board of harbor masters or regulations of the port, for there was not then and never has been any State or municipal law or regulation of the port requiring any vessel to anchor at any particular place or prohibiting them from anchoring at any particular place in the

harbor of New Orleans. Assuming, *ex arguendo*, that the men-of-war were anchored in an exposed or dangerous situation, still it was not unlawful for them to have anchored at such place, and the fact of their being at anchor in such place does not shift the burden of proof resting upon the moving craft, as stated above. A dangerous or exposed position is not an unlawful one, and although it be dangerous or exposed, if there is no law which prohibits it from anchoring at that place, it has a perfect right to anchor there without assuming any of the responsibilities which the Court of Claims places upon it.

"Undoubtedly," as was said by Judge Longyear in the case of the *Master of the Raynor* (cited ante), "there are safer places for vessels to lie at anchor, and where they would be a less obstruction to navigation. But no law or custom is shown prohibiting vessels from anchoring at the place where the craft was lying, and her legal right to lie there must be conceded."

In the case of the *Ogemaw* (32 Fed. Rep., 920) Judge Dyer said:

> If there is no rule or custom requiring a vessel to bring up out of the fairway, she may anchor there, although directly in the track of ships. Thus a vessel brought up in the Mersey directly in the track of the ferry steamers was not held to be at fault for lying there. The obligation of a ship under way to keep clear of another at anchor applies, although the ship at anchor is in an improper berth. And a vessel brought up in a berth which is improper only in the sense that it is an exposed or dangerous

position, does not thereby contribute to a collision caused by another ship negligently driving into her. (Mars. Coll., 224).

The sentence which the majority of the court below cited from Spencer on Maritime Collisions, section 120, refers only to vessels moored in an unlawful situation; that is, a situation positively prohibited by law. It has no sort of reference to a ship anchored in an exposed or dangerous situation, the law concerning which is given by the author in section 110 just as we have stated it above.

(*b*) These general doctrines of maritime law are emphasized by the provisions of the special act referring this case to the Court of Claims, wherein it is provided "that no judgment shall be rendered against the Government *unless it shall affirmatively appear from the evidence adduced that* such collision was the result of negligence on the part of the officers in command of said vessels of war."

Judging from certain expressions in the opinion of the majority of the court below, it would seem that the court below had conceived the idea that counsel for the Government in this case desired the court below to apply to this case the same rules of evidence as would be applied in a criminal case, and that the ships of war were to be shown to have been negligent beyond a reasonable doubt. Such has never been our contention. Our contention below and our contention here is that by the provisions of the special act the burden of proof is placed upon the claimant to show, in the language of the act, "affirmatively from the evidence

adduced that the collision was the result of negligence on the part of the officers in command of the vessels of war;" that is to say, that the case must be affirmatively proved by evidence and is not to be determined by presumptions such as the learned court below indulges in on page 17 of the opinion of the majority of the court.

The towboat *Future City*, with her barges, began her operations to land when she reached a point about opposite to Louisiana avenue in the city of New Orleans, where her engines were stopped and she was allowed to float with the current to a point between Toledo street and Harmony street, known as the Elevator. This Elevator is not shown on the map which accompanies the findings, but the distance from it to the barge landing, at which point this craft intended to land, is stated in the findings to be 2 miles. Thus this craft began making preparations to land 2 miles above her landing place. It was done in this wise: At this point known as the Elevator, her engines were reversed and she was backed in toward the New Orleans shore so that the current of the river striking the head of her tow would carry the tow downward, while the stern wheel of the boat remained in the slack water near the shore. The effect of this maneuver is to throw the head of the tow out into the stream at an angle of 45 degrees, when her engines were stopped and she was allowed to float down the stream in this position with the current. The tow, including the tow-

boat, was 607 feet long and 175 feet wide; the river is 1,800 feet wide, and hence, in floating down the stream in this way the towboat and barges necessarily occupied more than one-third of the entire width of the river during this distance of 2 miles from the Elevator to the barge landing.

We charge the *Future City* with negligence as follows:

First, in creating or promoting a dangerous situation from which she had no power to escape when confronted with danger. A tug having the power of directing her movements is bound to pursue a safe and consistent course and is not permitted to unnecessarily place itself and tow in an unnecessarily exposed or hazardous situation, and it is no defense that it used all reasonable means to avoid danger after having placed itself in a dangerous situation. (*The Osceola*, 57 Fed. Rep., 719; *The Syracuse*, 12 Wall., 166; *The Giovanna* v. *City of Philadelphia*, 59 Fed. Rep., 303; *The David Morris*, 1 Brown, 273.)

On approaching a narrow channel or dangerous situation it is the duty of the tug to ascertain that the channel is not obstructed and that there is sufficient room for its tow to pass in safety. (*The Osceola*, 50 Fed. Rep., 326; *The Chase*, 46 Fed. Rep., 874; *The Snook*, 49 Fed. Rep., 686; *The Ingram*, 37 Fed. Rep., 910; *The Drew*, 38 Fed. Rep., 858.) Extraordinary precautions are required of a tug navigating a narrow channel with a tow so large as to occupy a larger portion of the channel. (*The Lucy D*, 21 Fed. Rep., 142; *The Iron Chief*, 63 Fed. Rep., 289.)

Tested by these principles the conduct of the master of the *Future City* was negligent to the point of recklessness, and he has been most correctly described in the opinion of the majority of the court below as an *unwary* shipmaster. It is found by the court (Finding VII, transcript, p. 8, top) that when this craft reached the place known as the Elevator a sudden rain accompanied with high wind and thunder came up, and it is also found (Finding IX, transcript, p. 9, top) that this craft can not make out and see vessels or other objects in the river below Celeste street, because the river juts out at that point, and a craft occupying the position in the river that the *Future City* occupied could not see below said point on account of the shipping moored along said banks and the buildings in the city. We have, then, a towboat carrying eight heavily ladened barges which starts out from a place of safety in the rain accompanied by high wind down a 2-mile course, floating broadside with the current, knowing full well that she could not see any object below Celeste street, occupying one-third or more of the whole river's width, which takes no precautions to ascertain if the harbor is clear below Celeste street, but carelessly and negligently assumes that she will have a clear track for 2 miles down a narrow channel in a crowded harbor and that no difficulties will present themselves and no obstacles be encountered, and knowing full well that if such difficulties are presented or obstacles encountered the towboat was without power to avoid it. In recklessly creating this dangerous situation the *Future City* was

culpably negligent, first, because in descending the river in this wise she occupied the position which rightfully belonged to ascending steamers; second, because she was out of her proper course, which was the middle of the river; third, in leaving a place of safety during the presence of a storm without any necessity for so doing; fourth, in failing to ascertain whether the river was clear below the point at Celeste street, beyond which she could not see or know the condition of the river; fifth, in assuming to tow so large and dangerous a tow down a tortuous and narrow channel for the distance of two miles occupying more than one-third of the river's width without the power to handle her tow in case of emergency, and, sixth, in not dividing up her tow at the elevator and carrying it down in smaller quantities, so as to occupy less of the river's width and to be able to handle it in case of emergency.

In the case of *The Mohler* (21 Wall., 230) it is held that where in a high and uncertain state of the wind a vessel is approaching a part of the river in which there may be obstructions to navigation, it is her duty to lay by until the wind has gone down and she can pass in safety. In the case of *The Syracuse* (12 Wall., 167) it was held that a steamer having a very large tow approaching a place where from the number of vessels in the water and the force of countercurrents navigation with a smaller tow would be less dangerous, is bound to approach with great care, and if within 2 or 3 miles of the place she can divide her tow she is bound to divide it.

The court below seems to think that this is inapplicable because *The Syracuse* in this case had a tow of forty boats. But it is also to be remembered that the collision occurred near the Battery, where the East River and the Hudson River meet, and that there is a great expanse of water there. It is submitted that the principle of *The Syracuse* is directly applicable here and that a tow of forty boats near the Battery is, in comparison with the expanse of water, no greater than eight boats in the Mississippi River at this point.

In the case of the *D. K. Washburn* (19 Fed. Rep., 788) it was held that a steam tug with a tow in going around a dangerous point where the tide sets strongly across the river is not entitled to occupy one-half of the river on the right hand side. This is precisely the conditions in the case at bar. The court finds that the river current sets in strongly at about Celeste street over toward the Algiers shore, and further finds that the land juts out strongly at this point, around which the descending towboat could not see. It was at about this point also that the *Future City* passed the *Mabel Comeaux*, the *Comeaux* passing along the left bank and the *Future City* pushing her tow farther out into the river to enable the *Comeaux* to thus pass. The *Future City*, therefore, at this point must have appropriated to herself fully one-half of the entire width of the river.

In the case of *Goslee* v. *Shute* (18 How., 463) the collision occurred on the Mississippi River, between an ascending and a descending steamboat, whereby the former was destroyed. The evidence showed that the

collision was largely owing to the negligence of the ascending boat in not observing the rule which requires the ascending boat to keep near the left bank, and the descending boat to keep near the middle of the river, and the court held the ascending boat liable for all damages because of the violation of this rule.

Of course it is perfectly apparent why this method of navigation was adopted by the *Future City* with her tow. It was because if she descended in the middle of the river or once permitted herself to be caught in the current which sweeps over toward the Algiers shore she would have gone hopelessly beyond her landing 2 miles below, and would have been swept into the Gulf of Mexico unless assistance was rendered, for the reason that she had not sufficient power to battle against the current of the river or to back herself up or to flip her head around or to straighten herself against the current. This fact is admitted twice in the opinion of the court below. For instance, on page 26 the court say:

> If obliged to go to the right of vessels anchored about the middle of the stream, in the direction of Algiers, the towboat would have been carried down far beyond the landing.

And again, on page 27, the court say:

> If they did not pursue this course descending tows would come down in the current so far out the motive power could not back the tow to land.

The answer to this is that if the *Future City* was carrying a tow beyond her capacity to handle when

navigating in her proper course in the middle of the stream, then it was her business to divide up her tow and to have carried it down to her landing in sections of a size sufficiently small to have enabled her to have made her landing and to have controlled her tow. In 1 Parsons on Shipping and Admiralty, edition 1869, page 575, it is said:

> If a vessel chooses to avail herself of a particular mode of going down a river at a particular time and place which renders it difficult to escape collisions, if a collision does take place, she must bear the consequences of the contingency to which she has exposed herself.

And this is exactly the language of the High Court of Admiralty in the case of *The Hope*. (2 Wm. Robinson's Eng. Adm. Rep., p. 8.)

In the case of *The Nettie* (39 Fed. Rep., 615, at p. 616) it is said:

> A tow so made up was sure to prove unwieldy in any circumstances; but when it is remembered that for part of the journey it was necessary to proceed up a comparatively narrow and tortuous channel, where obstructions were quite likely to be encountered, the negligence is far more apparent. (The *British Empire*, 24 Fed Rep., 493; *The Margaret*, 94 U. S., 494.)
>
> It is perhaps true that it was more convenient for the tugs to tow as they did, and that better time could thus be made, but such considerations should not be permitted to outweigh those of safety.

In the case of the *Uncle Abe* (18 Fed. Rep., 270) where the tugs rounding the Battery were in the habit of hugging the New York shore so as to keep in the eddy, it was held that such practice was dangerous, and was done at the peril of the craft so doing. Judge Brown said:

> While it is admitted that it is a common practice for boats going either way around the Battery to hug the shore, this furnishes no excuse for any nonobservance of the rules of navigation. * * * The practice is a dangerous one, and must always be at the peril of the one who does so.

It is true there was a rule of navigation which prohibited vessels from adopting this course, and it is equally true that there is a rule of navigation on the Mississippi River which prohibits vessels from descending the river near the left bank, that position being the rightful one for ascending boats. As in the case of the *Uncle Abe*, the rule of navigation was defied on account of the ease and convenience which was afforded by the other method. But we say here, as was said in that case, that this ease and convenience furnish no excuse for failing to observe the rules of navigation. The practice is a dangerous one, and must always be at the peril of the vessel which adopts it.

We charge the *Future City* with negligence in attempting to descend the Mississippi River for a distance of 2 miles with an unwieldly and unmanageable tow far beyond her capacity to handle in any case of emergency.

It has already been shown that the attempt on the part of the court below to exonerate this craft by incorporating into its findings the statement that the *Future City* was amply powerful to handle the tow which she carried under any and all circumstances arising in the navigation of the Mississippi River is utterly unavailing for this purpose for the reason that the same is a conclusion and not a finding of fact, and for the reason that the facts which the court did find and those upon which it failed to pass demonstrate that its conclusion to this effect is erroneous.

It has been found by the court that when first sighted by the *Future City* the first man-of-war was 150 yards below her; that thereupon, and after some debate on the subject between the pilot of the *Future City* and the master of the craft, it was decided that the best course to pursue was to reverse the engines and endeavor to back and attempt to throw the head of the tow in toward the New Orleans shore and thus straighten her up from her flanking position to a sufficient extent to enable her to pass between the *Atlanta* and the New Orleans shore. It will be remembered that the tow was only 175 feet wide and 607 feet long, so that it is evident that if the *Future City* had had sufficient power either to have straightened herself up from her flanking position or else to have backed herself for 7 feet in toward the New Orleans shore, she could have passed the war ship in safety in a horizontal or even in a flanking position. But although this craft exercised all her power she was not able to do either and conse-

quently floated down upon the first man-of-war, breaking up her tow and producing the damage described in the findings. Can it be said that a vessel which can not change its course 7 feet in 150 yards has ample power to handle its tow in any and all circumstances arising in the navigation of the Mississippi River, and does not this fact demonstrate that the *Future City* was carrying a tow which she could not promptly and safely handle in the wind and current then prevailing?

And here again we see what great wrong and injustice has been done by the court below in failing to pass either affirmatively or negatively upon the requests made of it to find: That the *Future City*, in descending the Mississippi River in the manner described in these findings would require most of the width of the river in order to throw the head of her tow in toward the New Orleans shore and straighten herself and tow up to descend in a horizontal instead of a flanking position: that the said steamboat, exercising all her power, would descend the stream from one-half to three-fourths of a mile before she could straighten herself up from the flanking position to a horizontal one, and would descend the river at least 1 mile before she could check her headway and begin to back upstream.

In the defendants' motion for a new trial (record, p. 37), in which this finding is asked, it is charged that it is founded upon the testimony of Nicholas Beaver, the captain or master of the *Future City*, on direct examination and is corroborated by the testimony of the claimant's witness, R. C. Plant, and that it has never

been contradicted or denied. This fact should have been found by the Court of Claims, and if it had been there would have been an end of this case, for it demonstrates, first, not only the lack of power on the part of the *Future City* to handle the tow which she was then carrying, but also demonstrates that the maneuver adopted by the master of the *Future City* to avoid this collision must have been known to him at the time he took it to be utterly unavailing for that purpose and that it must necessarily have resulted in the very collision which took place. The ship of war was lying below him 150 yards. This is one-twelfth of a mile. He knew full well that he would descend the river from one-half to three-fourths of a mile before he could flip his head around toward the New Orleans shore and change his flanking position into a horizontal one, and he knew that he would descend the river at least 1 mile before he could check his headway and begin to back upstream. Yet, knowing that in the first case it would take from one-half to three-fourths of a mile, and in the latter case 1 mile, he undertook to accomplish that result in one-twelfth of a mile.

A tug has been frequently held for assuming to tow under circumstances rendered dangerous by its own lack of power to handle the tow. (*The Osceola*, 50 Fed. Rep., 326; *The Chase*, 46 Fed. Rep., 874; *The Snook*, 49 Fed. Rep., 686; *The Ingram*, 37 Fed. Rep., 910; *The Drew*, 38 Fed. Rep., 858.)

We charge the master of the *Future City* with negligence, third, because he did not adopt the proper

course to avoid the collision after sighting the first war ship. It is found that when the war ship was first sighted by the *Future City*, the *Future City* had just rounded the point of land at Celeste street and that a strong current sweeps over from the western to the eastern shore at the point in the river at Celeste street. Knowing that he could neither back upstream nor straighten out his tow in the distance of 150 yards, and knowing, as he must have known, that in attempting to do so it would inevitably result in his being swept down upon the war ship, it was his duty to have pushed himself out into the current and have permitted the current, supplemented by the power of his boat, to carry him to the starboard or right of the war ship. If this maneuver had been adopted he could have cleared the war ship in safety, and there would have been no collision, as is practically admitted by the majority of the court below in their opinion (transcript, p. 30), where the court say:

> The collision may possibly have been averted, it is true, if, when the ship was sighted, the tow had made for the Algiers shore

It is evident that the master of the *Future City* was also of this opinion and directed his pilot to execute the maneuver, but the pilot was of a different opinion and the master improperly permitted his judgment to be overruled by that of the pilot. On page 31 of the transcript the court say:

> Immediately upon discovering the ships the master of the tow directed the pilot to go ahead

so as to pass to the right in order to avoid tearing the wheel at the stern by the shipping along the shore. The pilot replied that by going ahead the whole tow would be wrecked, and acting on his judgment, the tow was backed, but without avail.

How much valuable time was lost in this debating match between the pilot and the master of the *Future City* we do not know, but there appeared to have been considerable conflict of opinion between the navigators of this craft and at this critical time. When prompt measures should have been taken to avoid the threatened collision they appear to have consumed that time in debating among themselves as to what was the proper course to pursue. The court below is not insensible to this condition, but excuses this bad seamanship on the part of the navigators of the *Future City* by saying that the vessel was *in extremis* and that hence the failure to exercise proper judgment and good seamanship was not a fault on the part of the master of the *Future City*. It is quite true courts have held that when a ship is suddenly and without warning and without fault on its own part confronted with immediate collision so as to leave no time in which to decide upon the best course of navigation that if the master of a ship does the best he can in such a condition of dire peril, he will not be blamed because he did not pursue the very best method of avoiding the collision. But such cases have no sort of application to the situation in which the *Future City* was found. In the first place, the situation was of her own making

and the result of her own recklessness, and in the second place, she was not *in extremis* at all and was not confronted with any immediate peril. There was a distance of one-twelfth of a mile between her and the object of danger, and there was plenty of time to decide and to deliberate upon the best method to pursue to avoid the threatened collision. It was his business to know the power of his boat and what she could accomplish with her tow. It was his business to know the currents in the river and the direction of the wind, and in such circumstances the law casts upon him the duty of taking the best methods calculated to avoid collisions, and for his failure to exercise good seamanship in such conditions the law holds him responsible.

In the case of *The Vanderbilt* (6 Wall., 225, at p. 230) this court, through Mr. Justice Clifford, said:

> Precautions not seasonably taken afford no defense against the charge of negligence in cases of collision, where it appears that the disaster might have been prevented by earlier action. Steamers approaching each other from opposite directions are required by the general rules of navigation, as well as by the recent act of Congress, to port their helms and pass to the right, but it is obvious that one or both may omit to comply with the requirement until their proximity is so close that a compliance is wholly inadequate to accomplish any valuable purpose. Proofs in this case show that the *Vanderbilt* ported her helm, but the change of her course was so late that it insured the collision,

> which might, perhaps, have been avoided if she had made an effort to pass the descending boats on the starboard side, next to the western shore. The great fault was that she did not change her course and pass to the eastern side of the channel before entering the fog bank, as all the witnesses agree she might have done without danger or serious inconvenience. Electing as she did to continue her course up the river on the western side, where those in charge of her navigation knew she was liable to meet descending boats, she was bound to exercise great care and caution; and it is clearly proved that she failed to comply with the requirement until it was too late to prevent the disaster.

In the case of the *Teutonia* (23 Wall., 77) this court, through Mr. Justice Clifford, said:

> Precautions must be seasonable in order to be effectual, and if they are not so and a collision ensues in consequence of the delay, it is no defense to allege and prove that nothing could be done at the moment to prevent disaster, or precautionary measures were not perceived until it was too late to render them availing.

In the case of the *Connecticut* (103 U. S., 703) the *Othello* was held equally in fault with the *Connecticut*, for the reason that the pilot of the *Othello* did not adopt the proper course to avoid the collision, this court, through Mr. Chief Justice Waite, saying:

> That the *Othello* was in fault is equally clear. There was time after the signal was given and before the collision happened for her to have

> avoided it if she had acted promptly. If the change in the course of the *Connecticut* had escaped her attention before, it was all the more important that she should be active then. Her pilot ought to have known that she could not pass in safety to starboard until the *Connecticut* had had time to get the tow out of her way. She should therefore have stopped, or shaped her course to get ahead of the *Connecticut*, if that could be done with safety. She did neither until it was too late. Under these circumstances it was not wrong to charge her with one-half of the loss occasioned by the mutual fault of herself and the *Connecticut*.

See also *The Syracuse* (12 Wall., 167–172).

We charge the *Future City* with negligence, fourth, in maintaining a dangerous rate of speed in descending the Mississippi River with a tow of this magnitude, which she could not control promptly in the presence of danger.

The statement of the court that the speed of this craft was 5 miles an hour, or a little less than the current, is demonstrated to be incorrect by the circumstances attending this collision. The current of the river is found to be more than 6 miles per hour, and since it is demonstrated that this craft was in the current after she rounded the point at Céleste street, and that in the space of 150 yards she did not have the ability to back 7 feet, it is manifest that she must have been descending with the current, and at least with the speed of the current, if not more. In navigating in foggy weather near piers, or where the presence of boats

may reasonably be expected, or in the navigation of a narrow channel, prudence demands the greatest care, and the speed should be reduced to a point where the forward direction of the boat may be changed on approach of danger. (*The St. John*, 29 Fed. Rep., 221; *The Jesse Russell*, 5 Fed. Rep., 639; *The Minnie*, 20 Fed. Rep., 543.) Seven or 8 miles an hour is too great a rate of speed for a steamboat having barges in tow at a dangerous point on the Mississippi River. (*Security Ins. Co.* v. *The Milwaukee*, 4 Am. L. T., 147; Spencer on Marine Collisions, sec. 148.)

Of course, it may be proved that excessive speed did not contribute to the injury, but the proof must be clear and positive, and the burden of showing that it did not contribute to the collision is always upon the party asserting the fact. (*The City of Macon*, 47 Fed. Rep., 919; *The Florida*, 4 Blatch., 470.)

On page 31 of the opinion of the court the majority of the court below appears to charge the officers of the ships of war with negligence in failing to respond to a signal given by the *Future City* to some other boat, the court saying:

> The *Future City* had, but a short distance above the point and before commencing to round it, signaled its approach to an ascending boat. Signals are to be used when the circumstances make them necessary, and while the warning was not what the men-of-war could claim as a matter of right, lying at unexpected places and unseen by the watch or pilots of the tow, *no response was made*.

We confess our inability to appreciate the charge of negligence which the court here brings against the officers of the warships. It is certainly a novel doctrine in maritime law that an anchored ship is expected to respond to a signal given by a descending tow to an ascending steamboat. We have not been previously aware that signals were supposed to be given to anchored ships, and we had not been previously aware that if the moving craft should give a signal to an anchored ship that it was the duty of the anchored ship to answer it. On the contrary, we had hitherto supposed that it would have been a gross impropriety for an anchored ship to respond to a signal for the reason that if it did so the moving craft might very well suppose that the anchored ship was in motion and consequently expect it to navigate itself according to the rules of navigation, and that by answering a signal misleading the moving craft into the belief that it also was in motion, and therefore able to shape its course, it would have been liable for this gross violation of the rules of maritime law. If the learned author of the opinion of the majority of the court below intends to charge the anchored ships with negligence in not responding to this signal, we submit that while he has succeeded in announcing a very original and unique doctrine in maritime law, yet this court will hardly affirm it.

In conclusion of this branch of the case we can not do better than call the court's attention to the dissenting opinion of Judge Peele (transcript, pp. 33–35), in

which the negligence of the *Future City* is most ably demonstrated.

It is therefore submitted, first, that the decision of the court below should be reversed with directions to dismiss the petition; or, second, that the so-called judgment rendered on March 21, 1898, and which is the only judgment which has ever been rendered in the case, be declared void and of no effect; or, third, that the judgment of the court below should be reversed and the case remanded to the Court of Claims with directions to grant the appellants a new trial; or, fourth, and at very least, that the value of barge 68 and its cargo should be subtracted from the judgment and the judgment reduced to $10,476.35.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

APPENDIX A.

COURT OF CLAIMS.

(Decided March 21, 1898.)

ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company *v.* THE UNITED STATES. } No. 18626.

(As reported in 33 C. Cls. R., 251, omitting syllabus.)

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On August 3, 1894, the following act of Congress was approved:

An act granting jurisdiction and authority to the Court of Claims in the case of the towboat *Future City*, her barges, cargoes, and so forth.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the legal or equitable owners or claimants of the steam towboat *Future City*, her barges in tow, cargoes thereon, freight, and personal effects contained in them alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war *Atlanta*, *Galena*, and

Richmond, in the Mississippi River, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war.

(28 U. S. Stat. L., p. 219).

II.

The claimant is and was at all times hereinafter mentioned a corporation incorporated under the laws of the State of Missouri.

III.

On May 7, 1888, and for many years prior thereto, the claimant was engaged in transporting grain and other merchandise in barges upon the Mississippi River, between the ports of St. Louis, in the State of Missouri, and New Orleans, in the State of Louisiana.

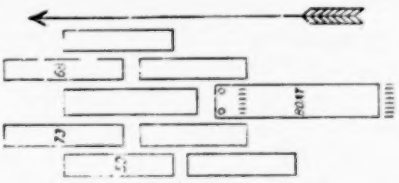
IV.

On May 7, 1888, and at all times hereinafter mentioned, the claimant was the owner of the steam towboat *Future City* and barges *50*, *68*, and *73*, and of the freight earnings of the said towboat and barges.

V.

The *Future City* sailed from the port of St. Louis on April 29, 1888, bound for the port of New Orleans

with a tow consisting of eight barges, including barges *50*, *68*, and *73*, all of which were heavily laden with grain and other merchandise, and a fuel barge which was left in the neighborhood of Greenville, Miss. These barges, in accordance with a custom well recognized and prevailing upon the Mississippi River, were arranged about the *Future City* in the manner shown by the following diagram:



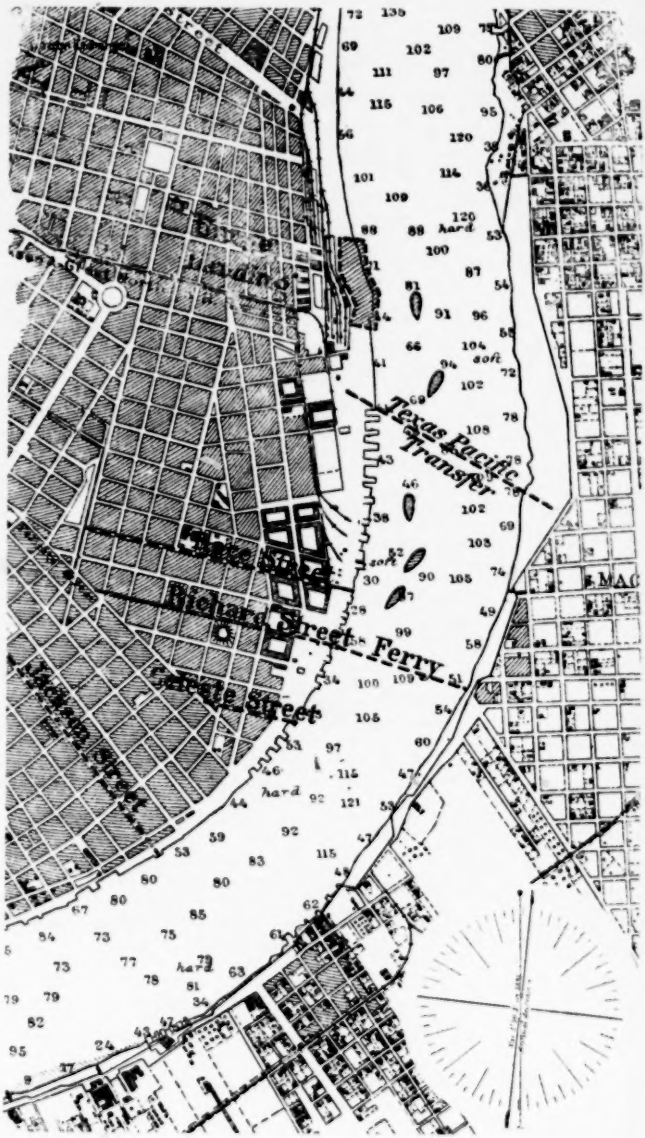
and were secured in the positions thus indicated, being made fast to each other and to the *Future City*. The tow thus made up was about 607 feet in length and about 175 feet in breadth. The barges were each 225 feet long, 10 feet hold, and 36 feet beam, loaded to their fullest capacity.

VI.

The *Future City* and the barges comprising her tow were all staunch, sound, and seaworthy, and were fully and adequately manned, officered, and equipped, and the *Future City* was amply powerful and able to handle her said tow under any and all circumstances arising in the navigation of the Mississippi River. Steamers like the *Future City* could safety handle fifteen loaded barges, 1,000 feet in length, as one tow.

VII.

The following is a diagram of a map of the portion of the Mississippi River at and immediately above the barge landing of the port of New Orleans:


Texas Pacific
Transfer
Richard Street Ferry
Galvez Street
Hard
soft

The bend in the river to which the tow proceeded in beginning preparations to land was in the vicinity of Louisiana avenue, near which was a building known as the "Elevator." This elevator does not appear on the diagram for the want of space, but it is 2 miles from the barge landing and about 1 mile from where the *Atlanta* lay. While descending, and having passed the elevator and above Jackson street, a sudden rain, accompanied with high wind and thunder, came up, which lasted five minutes, but when the tow reached Celeste street the rain had ceased and the wind had subsided. The blow did not affect the navigation of the tow or the control of the barges by the *Future City*.

VIII.

On May 7, 1888, nothing worthy of note having theretofore occurred during her said voyage, the *Future City*, with her tow, was descending the Mississippi River and was approaching the port of New Orleans, with the intention of making a landing at the wharf indicated upon the said plat as the "barge landing;" and while so descending the said river the *Future City*, following the proper and customary course of navigation for descending towboats with tows, well recognized and followed as such by pilots and other persons engaged in navigating the Mississippi River, ran in close to the New Orleans or western shore of the river at or about the "Elevator," and thereupon commenced backing, which brought her and her tow into a flanking position, nearly at right angles to the current of the river, her bow and tow extending out into the river and quartering downstream and her stern as close to the western shore as safety would permit. In this position, and still following the proper and customary

course of navigation for towboats with tows, she floated downstream with the current until she reached and rounded the point of land that makes out into the river from its western side at Celeste street, as indicated upon the plat set forth in Finding VII. Her rate of speed was about 5 miles an hour (being somewhat slower than the current), and she was backed occasionally to check her headway, and also to hold her stern as close to the western shore of the river as possible without endangering collisions with the shipping moored along its banks. The object of towboats with tows in adopting such a course is to avoid currents of the river, which sweep from the western toward the eastern shore in that locality, and which would carry heavily laden barges out into the stream and into the usual and customary track of steamboats and other unimpeded vessels. While the tow was proceeding to the landing a steamer known as the *Mabel Comeaux* approached from below, giving one blast of her whistle, so that the *Future City* might know of an intention on the part of the pilot of the ascending steamer to keep to the side nearest the city and that the tow must get out of the way. The signal from the ascending boat was answered by the *Future City*, and accordingly the tow was pushed out in the stream far enough from the shore to admit of the safe passage of the *Mabel Comeaux* next to the New Orleans side. The ascending steamer and descending tow passed each other in safety between the elevator and Celeste street. The change of the tow's course (to permit the steamer to pass) was not appreciable.

IX.

Prior to rounding the point of land at Celeste street, a towboat with a tow bound for the port of New Orleans and pursuing the proper and customary course

of navigation for such vessels, as aforesaid, can not make out and see vessels and other objects lying in that portion of the river below the said point of land and between the western shore and the middle of the stream, because that point and the buildings standing upon it, and the shipping moored along its banks, intervene and completely shut off the view in that direction.

Upon rounding the said point of land at Celeste street, and when she had reached a place about opposite Richard street, the *Future City*, for the first time, sighted and discovered five United States vessels, to wit, the *Atlanta*, *Galena*, *Ossipee*, *Yantic*, and *Richmond*, lying at anchor below the said point of land and between the western bank of the river and the middle of the stream. The *Future City* could not have made out and discovered the United States vessels before, because the said point of land intervened and, with the buildings standing upon it and the shipping moored along its banks, completely shut off the view in the direction of the portion of the river where those vessels lay at anchor. The United States vessels, as they then lay at anchor, were ranged in an irregular line in the order named along the western bank of the river, their distances from the said bank varying from 350 to 670 feet.[1] The *Atlanta* was anchored highest upstream and was about 150 yards below the Richard street ferry and sufficiently far to extend the entire fleet down the river for the distance of about 1 mile, the *Richmond* lying off the barge landing. At Celeste street the shore extends into the river to a sharp point and the river bends from that point to the north. Just below, the width of the stream is about 1,800 feet.

[1] Changed in present findings to "from 500 to 700 feet." See Transcript, p. 9.

The location of the *Atlanta*, 650[1] feet from the New Orleans shore, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than plaintiff's at that particular place engaged in flanking down to the landing because of the necessity for any tow trying to land to push out into the river to round the point opposite Celeste street. The upper vessel was at the entrance to the harbor, and the fleet located in the way of all vessels descending and seeking to land in the neighborhood of the barge landing. The positions of the vessels were substantially as indicated upon the plat. When the United States vessels were first sighted or discovered by the *Future City*, the *Atlanta* was distant from her about 150 yards.

XI.

The positions occupied by the said United States vessels on May 7, 1888, as aforesaid, were directly in the track of towboats with tows, descending the Mississippi River, bound for the port of New Orleans, and pursuing their proper and customary course of navigation, and thus were directly in the track or course which the *Future City* and her tow were pursuing, when she first cited and discovered them, as aforesaid.

XII.

The positions occupied by the United States vessels on May 7, 1888, as aforesaid, were improper and unusual, by reason of their being higher upstream, too short a distance below the point of landing at Celeste street, not at the bank, but nearer to the New Orleans or western shore in the river, than the proper, usual,

[1] Changed to 600 feet. Transcript p. 9.

and customary anchorage grounds for such or other vessels, or than vessels had ever before been known to occupy while at anchor. [When they were first made out and discovered by the *Future City*, as aforesaid, the United States vessels were anchored on a single or swinging chain (i. e., with but one anchor out), and on this account were constantly changing their positions from side to side, with each variation of wind and current, and thus varying the distances between them and the New Orleans or western shore of the river.][1] By reason of their being anchored so high up the river such short distances below the point of land at Celeste street, and so close to the New Orleans shore, and by reason of their swinging at anchor, as aforesaid, they rendered the navigation of the river, by towboats with tows, pursuing their usual and customary course, hazardous and extremely dangerous.

XIII.

On May 7, 1888, and prior thereto, there was an abundance of good and suitable anchorage ground lower down the river and nearer its eastern or Algiers shore, where it was usual, customary, and proper for vessels to lie at anchor while at the port of New Orleans, and where the United States vessels could have lain at anchor in perfect safety and without rendering the navigation of the river at the port of New Orleans either hazardous or dangerous for any vessels pursuing their usual, proper, and customary courses. Good holding ground for vessels like the men-of-war to safely anchor at all times existed within 20 feet of the Algiers shore.

[1] Portion inclosed in brackets [ ] omitted in present findings. Transcript, p. 10.

XIV.

The United States vessels came to anchor in their said positions on or about May 5, 1888, while the *Future City* with her tow was descending the Mississippi River on her voyage from St. Louis, and none of her officers or crew had notice or knowledge of their presence at New Orleans, or of their positions or whereabouts or of the manner in which they were anchored until they were sighted and discovered after the *Future City* had rounded the point of land at Celeste street as aforesaid.

XV.

After rounding the point of land at Celeste street, a towboat with a tow descending the river and bound for the port of New Orleans, and pursuing the proper and customary course of navigation for such a vessel, would continue to float downstream with the current, still in a flanking position, and with her stern as close to the shipping moored along the western bank of the river as safety would permit, until she reached a position a suitable distance above the "barge landing," where, taking advantage of the slack water, she would back hard, check her headway, and make her landing with her bow and tow downstream, on account of the eddy.

XVI.

As soon as she sighted and discovered the said United States vessels lying at anchor, in her usual and proper course, as aforesaid, the *Future City* backed under a full head, working full stroke, with all the power she had, thus adopting the only course, feasible and proper, under the circumstances, or in anywise calculated to prevent her from coming into collision with the said

United States vessels. Her object in so doing was to check her headway and straighten up or bring herself and her tow into a position broadside onto the shore, and as close to the New Orleans shore as she could, and yet escape collisions with the shipping moored there along. The width of her tow being about 175 feet, the *Future City* could have passed between the said United States vessels and the New Orleans shore had there been sufficient time and space for her to so check her headway and straighten up. On account of the insufficiency of time and space, after she sighted and discovered the United States vessels, as aforesaid, owing to the *Atlanta's* being anchored immediately below the point of land at Celeste street, and close to the New Orleans shore, and notwithstanding that the *Future City* made every possible effort to keep clear of the United States vessels, and in order that her tow might extend out into the river as short a distance as its length would permit, backed her stern as close to the New Orleans shore as it was in anywise possible, without coming into collision with the shipping moored there along, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew she was unable, on account of the short distance intervening, either to check her headway or to straighten up, and still being in a flanking position, she and her tow were carried by her headway and the current of the river and barge *73*, the lead barge of her tow, on the port side, came into collision with the *Atlanta*, striking against the ram of that vessel broadside on, with great force. As a result of this collision, barge *73* was cut down and sank, with all her cargo on board, and she, together with her freight earnings, became a total loss to the claimant. Thereafter, notwithstanding that the

Future City continued to pursue the only course feasible and proper under the circumstances, and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew, yet her stern having been swung slightly downstream by the collision of barge *73* with the *Atlanta*, she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and went down toward the *Galena*, which was lying about 400 feet astern of the *Atlanta* and closer to the New Orleans shore than the latter. [As the *Future City* reached a point about opposite to her, the *Galena*, which was swinging in and out in a single chain, sheered in toward the New Orleans shore and struck barge *68*, which was the lead barge of the said tow on the starboard side, and thereby cut down and sunk the said barge, with all her cargo on board, and the said barge, together with her freight earnings, became a total loss to the claimant.][1] In the collision between barge *68* and the *Galena*, the lines and fastenings of the said tow and the rigging of the *Future City* were parted or greatly damaged and her tow was broken up and thrown into confusion, and notwithstanding that she was skillfully and properly handled and that she and her officers and crew did their utmost to control her remaining barges, and to prevent further collisions between them and the United States vessels, barge *50* broke loose and was carried by the current and came into collision with the U. S. S. *Richmond*, which was lying at anchor directly opposite the "barge landing," and about 300 feet therefrom, and

[1] Portion inclosed in brackets [ ] omitted in present finding. See Transcript, page 11.

thereby barge *50* sustained great damage and the loss of part of its cargo. The loss sustained by the claimant as a result of the said collisions was as follows:

Barge *No. 68*, total loss		$6,500.00
Barge *No. 73*, total loss		6,000.00
Freight earnings barge *No. 68*		2,832.50
Freight earnings barge *No. 73*		2,844.88
Repairs to barge *No. 50*		1,250.75
Damage to rigging to towboat *Future City:*		
6 pair blocks, at $4.90	$29.40	
3,055 pounds line, at 11½ cents	351.22	
		380.72
Total		19,808.85

XVII.[1]

When the said United States vessels visited the port of New Orleans during the winter previous to the date of the said collision with the *Future City* and her tow, the officer in command of the squadron, on making inquiry, was directed by the chairman of the board of harbor masters of New Orleans, to anchor the said vessels as near to the Algiers shore of the river as possible, and was then told that in such an anchorage they could lie in safety, and would not interfere with or endanger the customary navigation of the river.

XVIII.[2]

When war vessels visited the port of New Orleans on previous occasions, they anchored from Canal street down to the custom-house, but on no occasion or at any time were they ever anchored just below the bend of the river near Celeste street, as in this instance.

[1] XVII and XVIII are entirely omitted in the present findings. See Transcript, page 12.

[2] XVII and XVIII are entirely omitted in the present findings. See Transcript, page 12.

Immediately below and under the point on the Algiers side of the river, above which there was a convenient, safe, and proper place for vessels to anchor, there was a strong eddy. Vessels coming from the south all come through that eddy, striking the current at the point; then they head quarter over to the city side close along the shipping to make their landings.

XIX. (Present finding XVII.)

In the navigation of the Mississippi River it is the custom of ascending steam vessels to navigate near the points, and descending steamers, if without tows, to run the bends; that is, the ascending steamers hug the starboard shore, while the descending steamers navigate to the right of those ascending the river. The navigation of tows vary. They are sometimes run across from point to point and then run around the point; but sometimes in turning a point down they are held in the same course and do not cross at all. The course is governed generally by the difference in the river at different places. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close in to the shore on the city side of the river. If they did not pursue this course, descending tows would come down in the current so far out that the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack water near vessels anchored to the shore.

XX. (Present finding XVIII.)

At all times hereinafter mentioned there existed at and for the port of New Orleans, in the State of Louisiana, a board of five harbor masters, duly appointed and acting according to law, of which John Brewster was duly elected and acting chairman.

XXI. (Present finding XIX.)

Among the duties with the performance of whic the aforesaid board of harbor masters are charged by the laws of the State of Louisiana is that of "regulating and stationing all vessels in the stream of the River Mississippi, within the limits of the port of New Orleans, and at the levees thereof." The said laws of Louisiana further provide for the imposition of a fine of $50 upon "any master or other person who shall oppose or resist any harbor master in the execution of the duties of his office."

XXII. (Present finding XX.)

The following is a correct copy of the proceedings of the said board of harbor masters:

Minutes of meeting held June 15, 1884.

OFFICE BOARD OF HARBOR MASTERS,
Port of New Orleans, La.

Present: Messrs. R. W. Adams, John Brewster, and M. J. Sheehan, who presented their commissions as duly appointed harbor masters of the port of New Orleans. Mr. Adams in the chair. Upon motion, duly seconded, Mr. Adams was elected secretary and treasurer; Mr. John Brewster, president; also moved and seconded that A. C. Norcroo, clerk of former board, be retained.

The following apportionment of districts was then made: Mr. John Brewster, second and third districts; Mr. M. J. Sheehan, fourth; Mr. H. Cain, first and fifth.

On motion of M. J. Sheehan, duly seconded, the following rules and regulations were adopted by the board:

1. The harbor masters have authority by law to regulate, moor, and station all seagoing or

coasting vessels at the levee, and to remove them from time to time to make room for others, and of the degree of accommodation which one vessel shall afford another the harbor master is constituted sole judge.

2. Vessels coming to the levee must have their yard braces sharp up by the starboard braces, their port anchor on the forecastle, and their starboard anchor cocked, billed, and ready to let go.

3. Any person cutting or interfering with the moorings of any vessel will be punished according to law.

4. Any person throwing ballast, rubbish, or anything that will sink into the river will be punished according to law.

5. The heating of pitch, tar, or rosin is strictly prohibited on any vessel lying at the levee.

6. All jib booms shall be rigged out unless by permission from the harbor master.

7. All vessels arriving at this port shall notify the harbor master of the district or leave word at the central office where the place of landing will be designated; otherwise [they will be] removed at the expense of the vessel.

8. No vessel shall change her berth without permission, and all vessels ready for sea shall give reasonable notice to the harbor master, so that there may be no cause of complaint.

9. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

By order of the board of harbor masters:

JOHN BREWSTER, *President.*
R. W. ADAMS, *Secretary.*

XXIII.

[Early in 1888 a fleet of United States war vessels, consisting of the *Atlanta*, *Galena*, *Ossipee*, *Yantic*, and *Richmond*, visited the port of New Orleans, La., during the carnival of the Mardi Gras, anchoring in said port partly below and partly above a point opposite Canal street in said city. While in this position complaint was made that said men-of-war were in the way of other craft navigating said harbor. Thereupon the commodore of the said fleet of United States vessels sent for John Brewster, chairman of said board of harbor masters, and informing him of such complaint, requested said Brewster to select for and assign to his fleet an anchor ground where said fleet might lie at anchor out of the way of other craft. Said Brewster did thereupon select for and assign to said fleet a place of anchorage in said harbor, drawing a line and pointing out the place at which he ordered and required said fleet to anchor. Said fleet then proceeded to sea for a short while, and upon returning to New Orleans dropped anchor at the places of collision, as aforesaid, and continued at anchor at those places until May 7, 1888, when the foremost of said fleet, the *Atlanta*, was run into by barges in tow of the towboat *Future City*, as hereinafter set forth in these findings. The places selected for anchorage by the war vessels were not the places assigned for the anchorage by the chairman of the board of harbor masters. Upon the return of the war vessels in May the harbor master was not notified of the fact nor was word left at the central office that the said vessels had returned. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet upon its return and was

without knowledge of the places taken in the river by the said war vessels.][1]

XXIV. (Present finding XXII.)

The said collisions were the result of negligence on the part of the officers in command of the said United States vessels, in bringing them to anchor in improper and unusual positions, and in causing them to be anchored on swinging chains, as aforesaid.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment in the sum of $19,808.85.

OPINION.

HOWRY, J., delivered the opinion of the court:

This suit has its origin in a marine collision, or series of collisions, on the navigable waters of the Mississippi River, in the port of New Orleans, between towboats propelled by a steamer called the *Future City*, belonging to the plaintiff company, and war vessels belonging to the United States. The gravamen of the action is the negligence of the naval officers in command of the vessels, and damages are claimed for the total loss and destruction of two of the towboats and for the amount expended in repairing a third barge as the result of the collision, and also for the amount of the freight earnings lost in consequence of the collision, the whole damages claimed being $24,308.85.

Jurisdiction to hear and determine to judgment the claim was conferred upon this court by an act of Con-

[1] This is entirely omitted and new finding substituted. See Transcript, p. 14.

gress approved August 3, 1894 (28 Stat. L., p. 219), in the following language:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claims of the legal or equitable owners or claimants of the steam towboat *Future City*, her barges in tow, cargoes thereon, freight, and personal effects contained in them alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war *Atlanta*, *Galena*, and *Richmond*, in the Mississippi River, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war.

The first question is the character of the special act under which the case has been referred and the rules which must govern in determining the rights of the parties. The claimant contends that the rules observed by all courts of law, equity, and admiralty where negligence is charged shall obtain. The defendants, on the other hand, contend that the last proviso to the jurisdictional act establishes rules materially different

from those which obtain in admiralty courts; that the additional proviso was intended to compel the plaintiff to prove the negligence of the officers of the war vessels beyond any reasonable doubt; that, even if the collision was the direct and proximate result of the negligence of the officers mentioned, yet if the moving craft of the plaintiff was guilty of any negligence whatever that contributed to the disaster the plaintiff can not recover.

Without statutes conferring jurisdiction the courts have no authority to consider cases of wrong arising in maritime collisions caused by Government vessels, inasmuch as the United States are not liable for the torts of their officers or agents except as they consent to be. But Congress have repeatedly recognized the obligation of the Government to compensate for injuries occasioned by the negligence of its agents. The legislative authority has been invoked time and again to give redress in some form or other, and this court has been used as the instrument of Congress in dealing with such cases. (*Sampson* v. *United States*, 12 C. Cls. R., 480; *Jane Carroll et al.* v. *District of Columbia*, 22 C. Cls. R., 104; *Joseph Krwin* v. *United States*, 23 C. Cls. R., 154; *Walton et al.* v. *United States*, 24 C. Cls. R., 372.)

The principle on which liability rests in cases of a similar character is the same as that which at common law obtains between private persons. This principle was well stated from the Committee on Claims by Mr. Lanham in a report to the Fiftieth Congress to be the responsibility of the property owner for the management and use of his property. That report was made to compensate certain claimants for the loss sustained by them in the destruction of their property as the re-

sult of the negligence of Government agents in omitting to place a proper and customary light on a pier which the Government was constructing on a navigable river, and resulted in the passage of an act which brought the matter to this court for determination. The direction was simply given there "to hear and determine" the claim to judgment, with the right of appeal, as in other cases. (*Walton et al.* v. *United States, supra.*) The act referring the present case provides that no judgment shall be rendered against the Government unless it shall affirmatively appear from the evidence that the collision was the result of negligence on the part of the officers in command of the war vessels. This requirement imposes upon the plaintiff the duty of affirmatively showing the negligence of the officers mentioned to have been the proximate cause of the collision. Without this there can be no recovery. Liability is neither increased nor diminished by the proviso.

The act does not impose upon the plaintiff the burden of establishing the negligence of the officers of the war vessels beyond any reasonable doubt. Crime is not the issue, and the rule invoked has no application in a civil action where mere negligence is charged and tort is the gravamen of the complaint. The requirement is fully met if the claimant satisfies the court that the negligence of the officers was such as to cause the collision without any corresponding negligence on the part of those in charge of the tow directly contributing to the result. The thing intended is legal relief for acts of negligence resulting in injury to the plaintiff; redress of wrongs for which compensation will be made when proved. The matter of negligence being thus submitted, qualified only as to how it must be made to

appear, the last proviso invested the plaintiff with all such rights as existed at common law in determining liability in cases of a similar character between others. The restrictive words, if they may be called such, are unappreciable because it is just as much the duty of the plaintiff to affirmatively show the negligence of the defendants without them as it is with them.

Ordinarily, it is a sufficient defense to show that the plaintiff himself was guilty of negligence that contributed to the injury. If the defendants, their negligence being established, allege that plaintiff's officers or servants were negligent and contributed to the injury, then the burden of proof rests upon the defendants to show that the plaintiff was also negligent and to such an extent that their conduct directly contributed to the injury. This rule has been declared to be in accord with the uniform course of decision in the Supreme Court. (*Inland and Seaboard Coasting Company* v. *Tolson*, 139 U. S. R., 557, and authorities cited.) These decisions have been followed by another, which declares that where the facts make the same applicable there is a qualification to the rule respecting negligence of the plaintiff, in that the contributory negligence of the plaintiff would not exonerate the defendants if the defendants by the exercise of reasonable care and prudence might have avoided the consequences of plaintiff's negligence. (*Grand Trunk Railway* v. *Ives*, 144 U. S. R., 408.)

The admiralty rule of an equal division of damages in the case of collision between two vessels when both are in fault contributing to the collision has long prevailed in England and this country. (*The Max Morris*, 137 U. S. R., 1.) But at common law the general rule is that if both vessels are culpable in respect of faults

operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. (*Atlee* v. *Packet Co.*, 21 Wall., 389; *Belden* v. *Chase*, 150 U. S. R., 691.) Therefore, under the terms of the special act in this case the damages can not be divided, even if the proof establishes direct mutual fault. The plaintiff is entitled to all the damages proved to have been sustained or to nothing.

For the purposes of this case, then, it is sufficient to say that if contributory negligence clearly appears on the part of the plaintiff of such character as directly produced the result, the plaintiff can not recover. But any mismanagement of the tow, or mere mistake of judgment on the part of her officers and crew at the critical period in the history of the collision, not the direct and proximate cause of it, will not relieve the negligence of the defendants. Where the fault on one side is flagrant and the other so trivial as to leave it doubtful whether there was fault on the latter's part or not, the benefit of the doubt must be given to the vessel charged with contributing to the injury. (*The Grace Girdler*, 7 Wall., 196; *The Great Republic*, 23 Wall., 20; Spencer Mar. Col., 338.) And if the fault of the one vessel is established sufficiently to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. (*The City of New York*, 147 U. S., 72.)

The plaintiff's case is that the collision (there were several collisions, but as they all happened about the same time and from the same cause we will deal with them all as one collision) resulted from and was occasioned by the negligence of the officers in command of the United States vessels in bringing them to anchor (1) in improper and unlawful positions, and in

an improper manner, and (2) in remaining at anchor in such positions, and in such manner.

A vessel in motion is bound to avoid one lying at anchor as far as it can do so.

The plaintiff's tow being in motion, the presumptions are with the defendants in fixing the blame. But these are mere presumptions, which can not be allowed to prevail against the ascertained and established facts. (*Fresh* v. *Gilson*, 16 Pet., 327; *Lincoln* v. *French*, 105 U. S. R., 614.)

If a vessel at rest is moored in an unlawful situation the burden of proof is upon it to show that the collision did not occur by reason of its exposed or unlawful situation (Spencer Mar. Col., sec. 120), but that it did occur by reason of the negligent conduct of the plaintiff.

Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for a collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. (*The Oregon*, 158 U. S., 187.)

With these principles in view, the questions respecting the negligence of the vessels arise on the findings, which determine the legal consequences.

The United States vessels were ranged in an irregular line below a point of land opposite Celeste street, the *Atlanta* being highest up the stream and two squares below the Richard street ferry. The *Galena* was next to it below; then, in the order named, the *Ossipee*, the *Yantic*, and the *Richmond*, the latter being at a point somewhat above but nearly opposite the barge landing.

The vessels were apart sufficiently far to extend the entire fleet down the river for the distance of about 1 mile. At Celeste street the shore extends into the

river to a sharp point, and the river bends from that point to the north. Just below, the width of the stream is about 1,800 feet. The men-of-war were lying along the western shore of the river at distances ranging from 350 to 600 feet. The location of the *Atlanta*, 600 feet from the New Orleans shore, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than plaintiff's at that particular place engaged in flanking down to the landing because of the necessity for any tow trying to land to push out into the river to round the point opposite Celeste street. The upper vessel was at the entrance to the busy part of the harbor, and in its entirety the fleet was located in the way of all vessels descending to the neighborhood of the barge landing.

On the part of the defense we are referred to some authorities which, it is claimed, tend to show that the anchorage taken was not improper. (*The Indiana*, Abbott's Admy. Rep., 330; *The Ceadberg*, 3 Wood's Cir. Ct. Rep., 32; *The Ogemaw*, 32 Fed. Rep., 920; *Culbertson* v. *Shaw*, 18 How., 585, noticed later on.) Without noticing these cases in detail, it is enough to say that they do not prove the right of one vessel to unnecessarily get in the track of others at points where, from the nature of things, collision is nearly inevitable to those trying to enter a harbor without knowledge of the anchorage of other craft in improper and dangerous positions.

The law of the road is well-nigh universal. It applies with greater particularity, if anything, to the thoroughfares of rivers and the sea than to land. Intended for the free and unrestricted use of all, roadways are expected to be kept open. Ordinary prudence and

caution suggest that none shall unreasonably stop in the pathway; or, if by chance this be done, that the improper position so taken be abandoned as early as practicable. So necessary to the safety of travel is this rule, obstructions in navigable waters within the States are dealt with as nuisances and indictable as offenses against the laws. When, in disregard of the rights of others, vessels negligently and carelessly come to anchor in the track of passing vessels, the owners of such craft must be held responsible for the consequences. Government agents can no more be exempt from the requirements imposed upon private individuals in this regard than persons without such responsibility. Sound public policy, as well shown by an able report of a Senate committee on this subject once submitted by Senator Hoar, requires the United States and all sovereign Governments to hold themselves responsible for injuries where the private rights of the citizen have been violated by the negligence of public officers. The common injury occasioned to a private person by the carelessness of the driver of a mail wagon or other vehicle passing through the street and engaged in the business of the Government has been thought to be the subject of responsibility upon every consideration of public policy and justice. Cases of injury occasioned by Government agents on the water are peculiarly within the rule of responsibility. (Cong. Rec., 50th Cong., 1st sess., part 1, 465.) The rules of navigation are ordained and required to be observed to save life and property employed in marine pursuits and not to promote collisions or to justify the wrongdoer where disasters occur. (*The Sunnyside*, 91 U. S., 210; *The Hasbrouck*, 93 U. S., 406.)

The abstract right of the Government's officers to run the vessels in their charge anywhere in our navigable streams and come to anchor in harbors is just as great as the right of other vessels to do the same thing. The only difference that can be suggested in this respect consists in the privilege of place of anchorage. Those possessing slips or wharfage rights (usually obtained for a consideration) may occupy such places to the exclusion of others, but the rights of all are the same in using the harbor, subject to the rules and regulations prescribed by proper local authority, and the rules of navigation in approaching and leaving its waters. When a vessel has committed a positive breach of a rule she must show not only that probably her fault did not contribute to the disaster but that it could not have done so. (*The Pennsylvania*, 19 Wall., 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S., 422; *Belden* v. *Chase*, 150 U. S., 699.) This rule may be considered of proper application in a case where, in positive disregard of local authority, masters of vessels have stationed them where injury was done to those unaware of their presence.

The authorities relating to the anchoring of vessels in positions where proper and customary navigation is rendered more difficult and dangerous or where such anchorage adds to the difficulties existing and produced by natural causes, impute negligence and culpability to those coming to anchor in such places under such circumstances. Thus, it is negligence for a vessel to anchor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking, it is especially reprehensible

for a vessel to moor in a situation tending to increase those difficulties. (Spencer, Mar. Col., sec. 99, and authorities cited.) So, if a vessel is at anchor in a proper place but is observant of the precautions required by law it is not liable for damages sustained by a vessel in motion colliding with it; but where it anchors in an unlawful position or fails to observe the statutory requirements and such other precautions as good seamanship suggest it must suffer the consequences. (*Ibid.*, sec. 106; *The Jeremiah Godfrey*, 17 Fed. R., 738; *Stroud* v. *Foster*, 1 How., 89; *The Buffalo*, 55 Fed. R., 1019; *The John H. May*, 52 Fed. R., 882.) Liability for getting in the way of an entrance to a harbor, whereby a moving vessel was injured, was distinctly recognized by the Supreme Court in the case of the *Brig James Gray* v. *The Ship John Fraser* (21 How., 187), where a vessel was being towed into port by a steam tug and came into collision with a vessel at anchor in the thoroughfare at a place where vessels bound out usually anchored for a short time to make final preparations for sailing on their voyage. While the vessel at anchor was not held liable on the ground that the lax execution of the regulations of the port had become a usage when the harbor was not overcrowded and the harbor master had acquiesced in single vessels anchoring in the thoroughfare, and the interpretation of the ordinance of the local authorities could not be more rigidly interpreted and enforced by the courts than by the authorities themselves, yet the decision lends emphasis to the general rule and settles it.

Being without anchorage grounds of their own, it was the duty of the commanders of the war vessels, if they had control of the matter, to anchor with reference to the conditions existing in a busy harbor, not

merely for the protection of the Government property in their charge, but for the safety of others. The vessels did not anchor at any wharf, but did stop at unusual places in the river directly in the pathway all vessels necessarily had to take to make their landings, and remained there for two days and until the collision, although there was plenty of room elsewhere in the harbor. Good holding ground for vessels to anchor at all times existed within 20 feet of the Algiers shore and out of the way of vessels coming to port.

If the anchorage selected was safe and proper for two days, it was so for a longer time, and if there was nothing improper in the selection then vessels of every kind had the right to anchor in the same positions and places at every opportunity. The *Richmond* must have been very much in the way of all vessels passing to or from the city side of the river with knowledge of her position; while to those without knowledge of it or to those navigating in the fog her position was extremely dangerous. No tow could make a landing in that vicinity while the *Richmond* remained in her position. The entire fleet was a source of danger to unwary shipmasters coming into the harbor both from above and below. The *Atlanta* just below the head of Celeste street, was more directly in the way of descending boats than the others. From her peculiar position she was consequently more difficult to pass by vessels coming from above than the other ships, and more dangerous to them than at any other anchorage that might have been selected. All the ships were anchored with a single chain and swinging to some extent.

[If the *Galena* had not sheered in at the time of the collision with barge 68, that much of the accident would not have occurred. Where a steamer is wrong-

fully in dangerous proximity to a flatboat and the proximate cause of collision is an unexpected sheer given to a flatboat by an eddy, the steamer is in fault and must bear the whole loss. (*Fritz* v. *Bull*, 12 How., 466.) This was held in a case where the flatboat was, from the time of its discovery by the steamer, in the proper channel of downward navigation floated onward only by the current. The flatboat being in an eddy and unable to direct its course with the same degree of certainty and promptness as a steamer, and the steamer's pilots having disregarded the consequences which eddies might produce, the loss was put upon the steamer.[1]]

When war vessels visited the port of New Orleans on occasions previous to the collision they anchored from Canal street down to the custom-house, or in that vicinity, but on no occasion or at any time were they ever anchored just below the bend of the river near Celeste street, as in this instance.

Immediately below and under the point on the Algiers side of the river, above which there was a convenient, safe, and proper place for vessels to anchor, there is a strong eddy. Vessels coming from the south all come through that eddy, striking the current at the point; then they headquarter over to the city side close along the slipping to make landings. Thus, the men-of-war were in the passageway of the customary route of ascending vessels seeking to land at any point above the location of the *Richmond*. The danger to an ascending boat would not be so great as to one descending, as an ascending boat could check its headway at will, but with a descending boat engaged in the attempt to land opposite or just below the anchored

[1] Portion inclosed in brackets [ ] omitted in present opinion. See Transcript, p. 20.

vessels with head downstream, there would be an apparent necessity for such boat to keep close to the landing shore to avoid the currents and eddies that would carry the boat trying to land either down or across the river.

The places selected by the men-of-war to stop made them more dangerous to passing vessels than if such vessels were steaming in the harbor. So much more dangerous may a vessel lying motionless on the water sometimes be over one under way, it has been held that a vessel may be at fault for lying still in the water only a minute and a half. (*The Britannia; The Beaconsfield*, 153 U. S., 130, 137.) Fault was found, it is true, in such a case where it was expected that a vessel would move forward and where it was thought by the court such vessel was under obligation to do so, but the authority is cited to show that under particular conditions and emergencies there is greater danger in the want of motion than in moving. The *Atlanta* was more dangerous anchored as she was than she would have been if moving, because with steam on and in motion she could have done her part in keeping out of the road if ascending in an improper part of the river.

On account of the irregular, or what the witnesses called the zigzag, position of the fleet the difficulties and dangers of entering the harbor were aggravated. This irregular line occupied by the fleet caused the ships to present an extensive front. If they had been moored in customary places no blame could attach to the ship's officers, because such situations were those where vessels were expected to be. Approaching boats are always supposed to be on their guard against the known places of anchorage for shipping, but the case before us discloses locations by the men-of-war too

far away from the New Orleans shore to admit of boats trying to go there to calculate upon passing to their right upon entering the harbor from above, and yet too close to the city side of the river to make the attempt to go between absolutely safe.

If to take an unlawful position means anything; if to get in the way and unreasonably stop carries any consequence; or, if disregard of statutory requirement has application where damage ensues to others, then this case must be ranged with those where vessels are guilty of culpable negligence in anchoring in the common passages of great thoroughfares. The ships were at the entrance and in the immediate harbor and in the way of others. All classes and sizes of water craft have the right to follow usual channels. (*Sherlock* v. *Bainbridge*, 41 Ind., 35; Wood's Cir. Ct. Rep., 16.) None possess the right to block these channels.

Necessity alone excuses vessels which are moored and lie in the channel or entrance to a port. (*The Scioto*, 2 Ware, 360; *Martin* v. *Five Canal Boats*, 24 Fed. Rep., 500; *The Margaret J. Sanford*, 30 Fed. Rep., 714; 63 Fed. Rep., 1020.)

The number of the ships increased the chances for collision with those unaware of their presence at places never before taken, and their size and weight made them more hazardous to those navigating in their midst. If securely anchored, they were planted like great rocks in the river without necessity; if by single chains, the dangers were greater with less necessity.

For this, who was responsible?

At the time of the collision there existed at the port a board of five harbor masters, duly appointed and acting according to law. Among the duties they were charged to perform by the laws of the State of Louisiana, the duty of regulating and stationing all vessels

in the stream within the limits of the port and at the levees thereof was imposed. Any master or other person opposing or resisting this board in the execution of the duties imposed upon them by law was subject to fine. The Mississippi River at New Orleans is entirely within the confines of the State of Louisiana The jurisdiction of the board of harbor masters over the water front extends along the Algiers shore. (*Pickles v. Dry Dock Co.*, 38 La. Annual, 412.)

The chairman of the board of harbor masters, who was introduced as a witness for the Government, disclaims, or attempts to disclaim, on behalf of the board, any control over vessels of the Navy, on the ground that such vessels pay no duties, and have the right to come and go as they please. Ships of the Navy have the right in time of war or peace to go anywhere in navigable waters pursuant to Government orders. But in time of peace they are as much subject to the reasonable rules and regulations adopted for the safety of all the shipping using a harbor consistent with their own safety and duty to the Government as others. The board of harbor masters at the port of New Orleans had the power and authority to prescribe where vessels might lie in the harbor. An ordinance of this kind embodying other similar regulations is not in conflict with any law of Congress regulating commerce, and is therefore valid. (*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*, 21 How., 184.) [The chairman of the board of harbor masters at New Orleans was consulted about the matter of location by the commanding officer of the fleet, and this chairman undertook to direct the location. The colloquy between the chairman of this board and the naval commander, which resulted in the location of the ships, can not be regarded as mere advice on the part of

the chairman. But whether regarded as advice or a positive direction, the ships were not located where their commander was told they should go. When complaint was made to the local authorities on the occasion of the first visit of the squadron that the ships were in the way, the naval commander applied to the chairman of the board to designate a safe anchorage ground for the fleet to occupy on their next visit to New Orleans, and the chairman directed the naval commander to lay over as well as possible to the Algiers shore. This direction was given with special reference to the return of the vessels, and just before the ships were ready to depart after the first visit. At the time of this complaint the ships were located in the neighborhood of Canal street in places no more objectionable than the places taken when they returned. Indeed, for vessels descending the river and trying to effect an entrance to the harbor, the place where the collision occurred was more dangerous to navigation than those taken on the occasion of the first visit. About four weeks intervened between the chairman's giving directions and the fleet's return to New Orleans. Though the chairman had given directions, he exercised no personal supervision of the actual anchorage of the fleet. The commanding officer undoubtedly desired to anchor in a place where his fleet would cause no inconvenience to merchant vessels, but it seems to the court certain that the fleet did not anchor according to the directions.[1]]

But was the tow free from fault? And what, if any, is the degree of this fault?

There are authorities which hold that, under given circumstances, it is the duty of tows coming to a part

[1] Portion placed in brackets [ ] omitted in present opinion. See Transcript, p. 22.

of the river in which there are obstructions to navigation to lie by and divide up the tow before attempting to land. In the case of *The Syracuse* (12 Wall., 167) it was held that a steamer having a very large tow and approaching a place where, from the number of vessels in the water and the force of the countercurrent, navigation with such a tow is apt to be dangerous, but with a small one less so—a place, for example, like that near the Battery, New York, where the East River and the Hudson meet—is bound to proceed with great care, and if within 2 or 3 miles of the place, though not nearer, she can divide her tow, she is bound to divide it. The *Syracuse* had a tow of 40 boats. Within a mile or so of the Battery that part of the harbor was seen to be full of vessels; to the view of the captain there seemed to be but one passage through which the tow could be taken. The tide was ebb, setting south in the North River, but above Governor's Island setting sharply to the west and southwest as it came out of the East River, so that the tow coming down the North River had the tide with her, but as she turned into the East River had to meet an ebb tide coming from the east nearly at right angles, while many vessels were lying at anchor all around. Of necessity the rear end of a long tow would be swept well around. The boat that was injured was at the rear end of the tow and a part of it. In deciding the case the court (after commenting on the omission of the master of the tow to stop above, as he had been doing at night with previous tows, and that it was easy to tell at the distance of a mile that the river at the Battery was full of vessels and at ebb tide dangerous to navigate through with such a fleet) said, the master, under these circumstances, should have remained at

the point of observation until the tide had slacked, or have divided the tow.

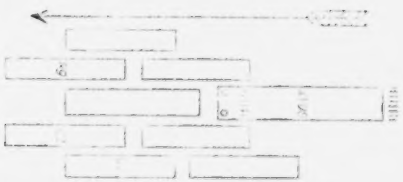
In the case of the *Mohler* (23 Wall., 230) the weather was boisterous, and the boat laid up on account of the wind. The weather had not cleared nor the direction of the wind changed when the boat resumed her journey. Being forewarned, the court held that the master should not have undertaken the passage of the river between two piers where, on account of the high and uncertain wind, there was danger of collision with one of the piers. It was consequently declared to be the duty of the master to lie by until the wind had gone down.

In the case of *Nicholson* v. *The Adams* (28 Fed. Rep., 889) it was held to be negligence for a tug to tow a large and deeply laden schooner up a narrow channel during the prevalence of a hard storm, with its sails unfurled and in such a condition as to cause the vessel to become unmanageable, whereby a collision occurred.

These cases speak for themselves. The facts in them differ materially from the circumstances shown to exist here. They mean in their last analysis that in the face of danger and with full knowledge of its existence masters of towboats shall not needlessly take risks that might well be avoided by timely precautions, and in no event must do so against the requirement of any law or the rules generally adopted for the safe landing of tows.

We can well understand the necessity for the division of tows and the consequent duty of masters to break them up and carry them to particular places in sections, where, from the number and size of the barges, navigation is rendered less difficult and dangerous

than if held together and propelled as one. We know of no rule on the subject save that which good seamanship and a proper regard for the rights of others and their own safety would suggest. Where channels are very narrow it is quite common for steamers with barges to stop and take them through one or two or more at a time, according to the emergencies of the time and place. But with an open river and a proper current they are generally kept together, according to the ability of the towboat to handle the barges in safety. The larger the tow the greater the difficulty of handling them, of course, but eight barges make a medium-sized tow; and steamers like the *Future City* could safely handle fifteen loaded barges of 1,000 feet in length. Those carried by the *Future City* were all staunch, sound, and seaworthy, fully and adequately manned, officered, and equipped, and the steamer wanting in nothing to perform its work. Other towboats possessing less power were in the habit of conveying larger tows down the river and landing them at New Orleans, without division, over the precise course adopted by the plaintiff. Unless towboats were propelling large barges laden with coal, where thirty or forty constituted the tow, it was not difficult to avoid collision in attempting to land. The arrangement of the barges about the steamer is shown by the following diagram:



The tow thus made up was about 607 feet in length and about 175 feet in breadth.

It was not customary to divide tows in landing them at New Orleans. They were carried in safety to the port as one. If we should declare, then, that tows should be divided, what sort of a division must it be? Into how many parts must one tow be separated? And shall the courts decide for river men and pilots what the laws and the rules of navigation have omitted to do in this respect? If experience had proved the safety of the course adopted in this instance, and usage had sanctioned it as free from danger to passing vessels or those anchored at their usual places in the harbor, then the question as to whether the tow should have been stopped at a reasonably safe distance before commencing to land and broken up must depend upon the ability of the towboat to handle her barges against expected dangers in safety to the place of landing under such circumstances as wind and tide and other causes may create at the time.

Was it incumbent on the tow to first sight the harbor before making preparations to land in the accustomed manner? If so, the right of tows to land at New Orleans at the places they have a right to go without being first divided must be denied, inasmuch as the current that is shown to set in to the Algiers shore at the place where the harbor comes in full view to those descending the river would carry tows into the bank on the side opposite the landing or far down the river. None in charge of a tow have the right to take chances between two courses—the one of safety and the other involving possible collison—by abandoning the safe for the more hazardous course. But every preparation to land in the usual way had been made, and the elevator had been passed as the *Future City* was attemping to place her barges at the proper place

on the river below. Then the squall struck, lasting some five minutes. The tow was drifting slowly at the time, with the watch on the front barge, the pilots at their posts, and the gauge in the engineer's room showing all the steam allowed by law. The rain had ceased just before the men-of-war were discovered, and the tow was under as much control as it could be at that point and in the quartering position made necessary by the usual methods adopted for landing.

To obviate a drift too far out in the current there is a necessity to resort to what is known as the flanking movement at that place. By backing toward the shore and keeping close enough to it tows are prevented from drifting across the river. Just before reaching a landing the tow is straightened up and carried in.

In rounding points towboats adopt one of two courses—"steering out" or "flanking." Steering out consists in the towboat backing her stern close in shore, thus throwing her head out into the stream, and then driving ahead at full speed around the bend. Flanking consists in placing the tow broadside nearly at right angles to the current of the river, the bow extending out into the river and quartering slightly down stream, the stern of the propeller being as close to the shore as safety will admit. In this manner tows are floated down, the steamer backing at intervals as the forces of the current carry the tows out. There is no driving except to get headway to flank on and to keep the stern of the steamer from the shipping by the shore.

Driving under such circumstances is very slight. As the landing is neared the steamer commences to back strong until it comes in a perpendicular shape to the New Orleans shore and parallel with it, and then lands. Flanking was the course pursued by the plaintiff's tow on this occasion.

The flanking operation is customary and proper and, in fact, the only feasible course in entering the harbor. Instead of driving ahead at full speed around the bend, precipitating the tow against passing vessels, the *Future City* backed in as occasion required, keeping far enough away from the shipping by the shore to avoid collision, but keeping up steam to control the load in front.

But was the *Future City* on the wrong side of the river? If so, she navigated wrongfully for mere purposes of her own convenience. In this event the encounter of the danger was needless, inasmuch as the convenience of the one vessel must be subordinated to the safety of others.

If, in conforming to custom, the tow began preparations to land 2 miles or more above, ascending steamers knew of the custom and (equally with the pilots of descending craft) were on the lookout to avoid danger. It is reasonably certain that watchfulness would be exercised by both ascending and descending boats under such circumstances, and especially by the descending craft, as safety was quickly assured without inconvenience by the descending steamer pushing her tow farther out in the river and clearing the fairway for an ascending vessel hugging the shore. This is what the defendants allege the *Future City* did do to avoid a steamer shown to have been passing. Though cleared in safety, it is argued that the *Future City* went so far in the stream she was caught in the current that sets in just about the point of divergence from her course and carried toward the middle of the river. The findings do not sustain the argument. Even if they did, the tow was doing the proper thing to keep out of the way of the coming steamer. It was necessary to go out in the river some to get around the point.

The passing steamer was known as the *Mabel Comeaux*. In approaching, the steamer blew one blast of her whistle, indicating to the *Future City* her intention to keep to the starboard or city shore and that the latter was to keep out of the way. It is argued that if the tow had the right of way the *Future City* could have kept her course, but failing therein, the collision around the point was the result. The failure of the tow to force the ascending steamer to its right was lawful and proper. When the pilots saw each other they were above Celeste street. When the *Comeaux* came in sight of the tow the latter was far enough away from the shore for ascending boats to pass safely between, and substantially there was no change in the course of the tow.

The contention that the tow erred in going too far toward the middle of the stream in order to avoid the *Mabel Comeaux* is in conflict with the theory of the defense, that the middle of the river was the place for the tow to descend. We take this argument, however, to mean that the *Future City*, having abandoned its right to descend in the middle of the stream, and having put herself in the bend, where her pilots were unable to see, she should have remained on that side and kept the tow close to the shore, thus forcing an ascending vessel to go to its right in the stream. But if the *Future City* was at fault in leaving the middle of the river in trying to land, then the navigation of tows in rounding points everywhere is dangerous and improper, and the practice adopted by pilots essentially wrong.

Before we condemn this practice and establish a new rule for the government of pilots in landing tows we will consider the propriety or impropriety of doing so from the circumstances appearing in this case.

If the line of the current had been followed the tow would have come down the stream to a point somewhere opposite Celeste street. That kind of navigation would have been improper, in that the force of the current upon a steamer and eight loaded barges so far from shore at that point would have operated to prevent the tow from being backed up in time to land. If obliged to go to the right of vessels anchored about the middle of the stream in the direction of Algiers, the towboat would have been carried down far beyond the landing. Thus, the tow would have been denied the right to land if under obligation to descend the middle of the river until the harbor was seen except by going down and breaking up to be brought back through the crowded harbor one at a time. But loaded barges are not expected to ascend rivers. By descending the middle of the river until in sight of her landing the advantage of keeping out of the way of unlawfully anchored vessels would have been secured, but the privilege of landing necessarily abandoned.

It is good seamanship to know how to make a landing and take advantage of all the slack water for that purpose. To run for easy places, back in, and reach landings on one side or the other is better seamanship than to deal with adverse currents. With the set-in to the other side of the river from Celeste street loaded barges carried to the middle of such a current would be dangerous because of the tendency to go into the bank or becoming unmanageable in the presence of boats crossing the river.

Ferryboats lie in the current same as tows floating down. The head of each ferryboat is not upstream nor are they stationary, except as they arrive and depart from their places of landing. Both tow and ferry-

boat being in motion and floating with the current, collisions do not occur.

Had the tow kept near the shore on the opposite side of the river and continued to a point below Celeste street, the landing on the New Orleans side could have been reached only by crossing the stream. Apparently there would have been much more danger to shipping in the harbor in this procedure than in the course pursued, as barges can not be carried to land like a steamer free from such incumbrances. The space occupied by a tow in crossing the river would have imposed greater danger where vessels were most numerous.

In landing tows steamers propelling them must, of course, turn in somewhere to the bank. If there is reason to believe that danger is ahead sufficient to render escape from collision difficult, measures must be taken to avoid it. Without such knowledge or some reasonable ground to justify the belief that danger is about to be encountered, the descending vessel has the right to obey custom and those rules observed in navigation and sanctioned by usage as safe.

The danger to the tow in this case was an unanticipated peril. The expected source of danger was the shipping in the harbor alongside the landings and places where they were accustomed to be moored, and in outgoing vessels.

The rules of navigation invoked to sustain the alleged fault of being on the wrong side of the river are those applying to the right of way on Western rivers, and it is claimed that under these rules where a descending boat navigates close in to the shore at the risk of collision with upgoing boats, the steamer descending violates the custom and is blamable for any collision.

Inspectors' Rule I, referring to right of way on most

Western rivers (Spencer Mar. Coll., sec. 141), and the custom prevailing for the navigation of these rivers under inspectors' Rule V (ibid., sec. 145), and the case of *Goslee* v. *Shute* (18 How., 463) cover cases of ascending and descending steamers and the consequences of deviating from a custom established by usage. Their application to a descending boat in the case of others not ascending but stationed at improper places is not apparent, but will be considered.

It has been held under Rule I that as between steamboats and flatboats the right of way is with the latter and the steamer is obliged to avoid them. (*The Marshall*, 12 Fed. Rep., 921; Spencer Mar. Coll., 288.)

In the navigation of the Mississippi River it is the custom of ascending steam vessels to navigate near the points and descending steamers, if without tows, to run the bends—that is, the ascending steamers hug the starboard shore while the descending steamers navigate to the right of those ascending the river. The navigation of tows vary. They are sometimes run across from point to point and then run around the point, but sometimes in turning a point down they are held in the same course and do not cross at all. The course is governed generally by the difference in the river at different places. No fixed rule for the navigation of tows exists for every part of the river. No doubt it is customary for them to recognize the course of an ascending boat to hug the starboard shore (going up) and to keep out of their way. In landing and leaving the harbor there is a customary course at the port of New Orleans. Outgoing vessels run close in to the shipping in ascending; incoming downward steamers and tows find their usual course to the point where it becomes necessary to back in to reach their landings

below. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close in to the shore on the city side of the river. If they did not pursue this course, descending tows would come down in the current so far out the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack water near vessels anchored to the shore. This is so as to all landings, and in trying to reach any stopping place in any harbor, it is either one side or the other that boats must necessarily pursue.

It is insisted that the custom was improper, negligent, and dangerous, because of the space occupied by any tow in trying to land.

In approaching a harbor it is the duty of steam vessels to approach with care and a moderate rate of speed. Barges and the steamer towing them, like vessels in charge of a tug, are in contemplation of law but one vessel and that under steam. With no higher rights than steamers, yet in their actual navigation tows are much the same as sailing vessels. There are differences between the movement of steamers with tows and those without them. Steamers land with more ease and dispatch and in less sea room than towboats, and in entering a harbor the currents tell more powerfully against a tow to prevent an easy landing unless the preparations for reaching land are taken in advance of the time necessary to begin preparations to go to the shore by a steamer unattended with barges. On account of their size and bulk there is greater reason for care and moderate speed in handling tows, but beyond this no greater burden is imposed upon their navigation than other craft.

It is not negligence to navigate a harbor with a large tow, much less a medium-sized one, if the tow be manageable. The navigation of a harbor at night or in a thick fog is not of itself negligence (*The Sylph*, 4 Blatch., 24; *Ward* v. *The Rossiter*, 6 McLean, 63; *Ward* v. *The Dousman*, 6 McLean, 231; *The Scioto*, 2 Ware, 360; *The Wesley A. Gore*, 27 Fed. Rep., 311; Spen. Mar. Col., sec. 157), the only burden imposed by navigation generally at night or in a fog being the added care to avoid danger, and this rule would include the navigation of tows.

Tows form an important part of the commerce of our Western waters. The flatboat preceded the use of the steamboat on the Mississippi and bids fair to supersede the use of steam vessels, except for purposes limited to the handling of tows and the trade of the river at points not reached by railroads or places where discriminating rates are supposed to prevail.

The traffic which coal boats from the Ohio and grain boats from the Missouri make on the Mississippi River is large, and, although unwieldy as compared with steamers, tows pursue their course in comparative safety if experience be any guide. They move slower than steamers, take courses that the latter do not, run the bends where descending steamers keep in the middle of the river, and frequently resort to the one course they can take where steam vessels can make a choice between channels.

Speaking of the right of vessels to vary their courses, the Supreme Court, in the case of *The John L. Hasbrouck* (93 U. S. R., 407), said: "Vessels of all kinds, whether propelled by steam or sails, are allowed and expected to vary their respective courses to correspond with the well-known sinuosities of the navigable portions of the river and to avoid the dangers of naviga-

tion arising from locks, shoals, and sand bars, as well as from curves and bends in the banks of the river or the channel of navigation." Thus, when a change of course is reasonably necessary to prevent a sailing vessel from running into the bank or encountering any other natural obstruction to the navigation, such change is obviously permissible, necessary changes not being violations of the sailing rule. Rules of navigation vary according to the exigencies of business and the wants of the public. (*The Favorita*, 23 Wall., 598.)

Carried to its full extent, the argument for the defendants would place the tow in the middle of the river in all cases where there were bends, because of danger from ascending vessels, or of stopping at every bend to see if there was anything in the way below. It has been shown that the plaintiff's tow had no reason to anticipate that the operation of the current or the force of the wind or the weight of the tow would have any bearing upon her duty with reference to anything situated as the war vessels, because her managers had a right to expect that the channel at that distance would be clear from steamers leaving the wharf or from vessels brought to anchor at the wharf or in proper places near the shore. Her master had a right to expect that the coast would be clear at that point from steamers coming out from the wharf. The timely measures of precaution required to be taken in all cases relate to evident or reasonably expected dangers without imposing the obligation in the case of tows to abandon the customary methods of flanking around points reasonably supposed to be free from obstruction.

The authorities to which we are referred establish fault in particular cases under circumstances widely different from those in the case at bar.

The case of *The Alicia Washburn* (19 Fed. R., 788) was where a steam tug with her tow was going around a dangerous bend where the tide set strongly across the river and a schooner rounding such a bend in the opposite direction was becalmed. It was held that the steam tug was not entitled, as a matter of right, to occupy the full half of the river on the right-hand side; and that tows overtaking each other in that vicinity, unless sailing to the extreme right of the river, should forbear attempting to pass each other until they had gone beyond the points of danger.

In the case of *The Uncle Abe* (18 Fed. R., 270), there was a positive nonobservance of the rules of navigation and a violation of the State statute forbidding steamers to approach or to pass boats ahead of them within 60 feet. This was a case where the tow had come around the Battery in the harbor of New York and was proceeding up the East River, and on approaching another tow from Albany, known as the *Walt Clark*, undertook to pass between it and the tugboat *Christian*, which was 200 or 300 feet astern and a little outside of the *Clark*. By the inspector's rules the *Uncle Abe* was bound to go astern of the *Christian*, and by rule 19 she was bound to keep out of the way of anything on her own starboard hand instead of keeping near the New York shore and attempting to cross the bows of the other tug between the latter and the other tow. The speed was not checked, and under the State law forbidding steamers to approach or to pass boats ahead of them within 60 feet, the *Uncle Abe* was held liable.

In *Goslee* v. *Shute*, *supra*, the collision was chiefly owing to the neglect of the ascending boat to keep near the right bank, and the descending one to keep near the middle of the river. The descending boat

had left a landing and resumed her journey, and the ascending steamer had left the way established by usage. The descending vessel being in her proper place, and the ascending vessel being in an improper course, the latter was held liable. Both were steamers unattended with tows. If the ascending boat had continued near the right bank of the river there would have been no collision The case at bar more nearly resembles one where it was held that barges anchored in a place of manifest danger in the way of tows coming out on the rise of water with pilots ignorant of the anchorage, blame was put on the barges at anchor. (*Fawcett* v. *Morgan*, 6 Fed. Rep., 200.)

If usage can make lawful and proper the navigation of a river so that both ascending and descending vessel shall keep to the right of the center of the channel, as on the Hudson River (*The Vanderbilt*, 6 Wall., 225), no valid reason can be assigned against the custom of a tow entering the harbor at New Orleans to follow the rule adopted there of going in on the city side of the river to barge landings, even though up-going steamers ascend on the same side, each craft being supposed to know how to avoid direct meeting. Every deviation from custom is at the risk of those not following it.

Independent of usage the *Future City* was not in fault, because the course adopted was best if the object was to land. If the intention was to go on without landing, the right to round the point in safety was included in the privilege of varying the course for that purpose.

The last question respecting contributory negligence is the conduct and management of the tow after rounding the point from where the ships were first seen. Upon discovering the danger did the master and pilots

exercise the proper degree of skill? Was everything done that could reasonably be expected to be done to avoid the collision?

Persons in certain emergencies and called upon to act upon peculiar circumstances are not held to the exercise of the same degree of caution as in other cases (*Thurber* v. *Harlem Bridge Co.*, 60 N. Y., 326; *The City of New York*, 35 Fed. R., 604; *Union Pacific Railway Co.* v. *McDonald*, 152 U. S., 281); and whether a vessel threatened with collision without her fault adopts the best course is unimportant if she adopts the one she thinks best. (*The Brown and the Hamilton Fish*, 35 Fed. R., 60; *The Excelsior*, 38 Fed. R., 271; *The City of New York*, 147 U. S., 72). Regard must always be had to the exigencies of the injured party's position and to all the circumstances of the particular occasion *Kane* v. *Northern Central Railway Co.*, 128 U. S., 95); and where human life and personal safety are involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances under which that effort was made show recklessness or rashness. (*U. P. R. R. Co.* v *McDonald*, *supra.*) And where one vessel is brought into immediate jeopardy by another's fault, such vessel is not liable because she has not been managed with perfect skill and presence of mind. (*The Maggie Smith*, 123 U. S., 349; *The Blue Jacket*, 144 U. S., 391, and authorities cited.)

Change of course on the water in an emergency does not render the vessel so changing her course liable for resulting collision. (*The Schmidt* v. *The Reading*, 43 Fed. R., 815; *The Agnes Manning*, 44 Fed. R., 110.) The charge of negligence here, however, is the

failure of the tow when confronted with the men-of-war to get out of her course and abandon the attempt to reach the landing and, instead of seeking to go between the ships and the city side of the river, to have made an effort to clear the anchored vessels by going to the side of the river opposite the landing. The collision may possibly have been averted, it is true, if, when the ship was sighted, the tow had made for the Algiers shore. But it is not probable, in view of the short distance between the tow and the ships after their discovery, and in view of the strength of the current there, that the collision could have been averted. It is more probable that any attempt to cross the river above the men-of-war at that time and place would have resulted in a collision even more disastrous than that which actually took place. For an act resolved upon *in extremis* under such circumstances the plaintiff can not be held responsible. (*The Sarah Thorp*, 44 Fed. R., 637; *The Nichols*, 7 Wall., 666.)

If the ships were in exposed and dangerous places, their officers are not in position to assert that the tow should have been propelled across the bow of the forward ship, even though the wrong means appeared to have been chosen by the tow to get out of the way. In such cases the law will not hold the pilot of the tow guilty of fault unless his seamanship was clearly unskillful. (*The Favorita*, 18 Wall., 603.)

The tow was advancing at a slow rate of speed, and at a rate not as great as the current. This speed was not over 5 miles an hour. The *Future City* had, but a short distance above the point and before commencing to round it, signaled its approach to an ascending boat. Signals are to be used when the circumstances make them necessary, and while the warning was not what

the men-of-war could claim as a matter of right, lying at unexpected places and unseen by the watch or pilots of the tow, no response was made. Signals from the *Future City* availed nothing anyway, as the ships were lying dead in the water and could do nothing to relieve the situation. The helplessness created by the ships' officers can not excuse the injury done to others at the time and place. Immediately upon discovering the ships the master of the tow directed the pilot to go ahead so as to pass to the right in order to avoid tearing the wheel at the stern by the shipping along the shore. The pilot replied that by going ahead the whole tow would be wrecked, and, acting on his judgment, the tow was backed, but without avail. The ships were discovered too late. The *Future City* backed the tow under full head of steam, working full stroke, with all the steamer's power, to check the headway and straighten the tow. The object was to bring the tow broadside to the shore, so as to pass between the *Atlanta* and the landing side of the river. It is not disputed that (in the language of the river) the *Future City* was "gonged" and every effort made to straighten the barges, which, if completely successful, would have entirely averted the disaster. The headway of the steamer had only been lost to the extent which the quartering position taken to get to the shore made necessary. The tow was in as much control of its motive power at the time of the discovery of the vessels as any tow could well be engaged in an attempt to land at such time and place. Fault can not be inferred from the methods used to descend as in the case of an ascending steamer approaching a landing in the face of a high wind and sensible enough of danger not to attempt to fasten to another steamer already

lying at the wharf, but where blame was attached for backing on a flatboat in ground designated for flatboats in trying to land above the flatboat. Such a case was *Culbertson* v. *Shaw* (18 How., 585, cited by the defense), where the river was open and a safe landing might have been made if the steamer had turned instead of voluntarily losing its headway by the order to back down to the flatboat. In this case the river was not open and the discovery of the ships found the tow at an angle with a landing impossible if the *Future City* had not kept backing with the danger of collision greater if the attempt had been made to cross the bow of the improperly anchored ship below.

The distance between the tow and the ships when the latter were discovered by the tow on rounding the point opposite Celeste street was the distance from that point to the place where the *Atlanta* lay opposite Race street. In that distance the tow could not check its headway or change its course. In the effort to keep out of the way the *Future City* came within a short distance of the shipping moored by the river bank next to the city, and everything possible was done to avoid the collision. The findings on this point are sustained by all the evidence, including an official report. The lead barge, on the port side, struck the ram of the *Atlanta* broadside on; the tow went on with the current toward the *Galena*, lying some 400 feet astern of the *Atlanta* and closer to the New Orleans shore than the latter. As the *Future City* reached a point opposite to her, the *Galena*, which was swinging in and out in a single chain, sheered in and struck the lead barge on the starboard side and sunk it, and also cut the fastenings of the tow. This resulted in an unloosed barge being carried by the current into collision with the *Richmond* still nearer the landing.

The accident was not the result of natural causes, occasioned by the forces of wind and current. In cases where the loss is occasioned by a storm or other *vis major* each party must bear his own loss, upon the principle that no one is responsible for loss produced by causes over which human agency could exercise no control. In the case of the *Grace Girdler* (7 Wall., 196), inevitable accident was declared to be where a vessel is pursuing a lawful vocation in a lawful manner, using the proper precautions against dangers, and an accident occurs. Where collision occurs exclusively from natural causes and without any negligence or fault either on the part of the owner of the respective vessels or of those intrusted with their control and management, the rule applies, but if fault or negligence be shown to have been committed by one or the other the rule can have no application. (*Union Steamship Co.* v. *New York and Virginia Steamship Co.*, 24 How., 307; *Sampson et al.* v. *United States*, 12 C. Cls. R., 480; *The Clarita and The Clara*, 23 Wall., 1.) When the respective vessels are seen by the other and disasters occur it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. (*The Morning Light*, 2 Wall., 560; *The Pennsylvania*, 24 How., 330.) Tested by these rules the defense of inevitable accident fails in the case before us. No natural causes operated to render the navigation of the river unsafe for the towboat to enter the harbor. The river currents were not such as to interfere with the methods adopted by the towboat to land its barges in the places

they were entitled to go. The wind and rain had no appreciable effect upon the movements of the tow. Whatever blow there was at the time was encountered after the attempt to land had been begun and was not of sufficient violence to interfere with the course the tow would have pursued independent of the wind and rain, which had subsided by the time the vessels were discovered. The weather did not delay the discovery of the ships, concealed as they were by the permanent obstructions on the shore and by vessels moored along the river banks. Due care and caution, with a reasonably proper display of nautical skill, was shown on the part of the plaintiff's agents. It should not be made to suffer for the fault of others. These officers located their ships in that part of the river which tows were in the habit of using to make their landings. They took no notice of the rights of others, or misunderstood the chairman of the board of harbor masters. In either event the consequences of their negligence are the same.

The opinion of the court is that the plaintiff is entitled to recover the value of the property destroyed and amounts necessarily expended in repairs to the towboats not destroyed but damaged by the collision and the amount of freight earnings lost by it. The total damage proved to the satisfaction of the court amounts to $19,808.85, for which judgment will be entered.

PEELLE, J., dissents:

I dissent from the conclusion of the majority of the court in this case, because, in my judgment, the master of the *Future City*, with her tow of eight barges, each 225 feet in length, 10 feet hold, and 36 feet beam, loaded to their full capacity, did not exercise ordinary

care and caution on entering the harbor of New Orleans, or in the handling of her tow after she entered; and that, therefore, even if the vessels of the defendants were anchored at an improper place in the harbor, the negligence of the *Future City* contributed to the collision and the consequent loss of her barges, and there can be no recovery. (*The Maria Martin*, 12 Wall., 31; *The Continental*, 14 Wall., 345; *The Sunnyside*, 91 U. S., 208; *The America*, 92 U. S., 432.)

Although the rule of navigation for vessels passing each other on the Mississippi River, and as adjudicated, *Goslee* v. *Shute* (18 How., 463), requires the descending boat to keep near the middle of the river and the ascending vessel to keep near the right shore (and this applies to tows), *Snow* v. *Hill* (20 How., 543, 550), the plaintiff contends that, in respect of a steam vessel with barges in tow on entering the harbor of New Orleans, a different rule prevails, i. e., that in lieu of such rule a well-known custom prevails applicable to tows, and upon such custom the plaintiff grounds its right to recover in this case, though the usage or custom relied upon does not appear to have been ancient, reasonable, generally known, and certain, as required under *United States* v. *Buchanan* (8 How., 83, 103).

The special act (set out in Finding I) referring the claim to this court, "with jurisdiction and authority to hear and determine the same to judgment," contains the proviso that "no judgment shall be rendered against the Government unless it shall affirmatively appear from the evidence adduced that such collision was the result of negligence on the part of the officers in command of said vessels of war."

While the language of the proviso but emphasizes the well-known rule of law, it leaves no room to doubt

the purpose of Congress in respect of the application of the rule in this case.

What are the facts?

About May 5, 1888, the defendant's vessels entered the harbor of New Orleans and came to anchor, their distances from the western bank varying from 650 to 350 feet, while the entire fleet extended down the river from the barge landing about one mile. (Findings X, XIV, and VII.)

In this position the fleet remained until the collision two days later, during which time it does not appear that the harbor master, whose right and duty it was so to do, gave any direction or suggestion to the officers in command to change their places of anchorage. (*The James Gray* v. *The James Frazier*, 21 How., 184.)

After rounding the bend in the river at the place called the "Elevator" (not shown on the map), about one mile from where the *Atlanta* lay anchored, the towboat began to back and so continued until her tow, 607 feet in length, was brought, as Finding VIII shows, "into a flanking position nearly at right angles to the current of the river," with her stern as near the New Orleans shore as safety would permit—i. e., safety to vessels moored along the bank.

In this position she floated downstream with the current, and when about opposite *Jackson street* a sudden squall of high wind and rain, accompanied with thunder, developed, lasting five minutes or more (Finding VII), during which time the steamboat *Mabel Cameaux* came upstream, hugging the New Orleans shore (Finding VIII), and when nearing the point opposite *Celeste street* she blew one blast of her steam whistle, thus indicating her intention to keep to the starboard or New Orleans shore, to which the *Future*

City, notwithstanding her option in the premises (*Blanchard* v. *New Jersey, &c.*, 59 N. Y., 292), assented by answering with one blast of her steam whistle, thereby compelling her to pass to starboard and to push her tow farther out into the stream in order to do so; and in this position she rounded the bend in the river at *Celeste street*, and when opposite *Richards street*, 150 yards from the *Atlanta*, with her tow quartering out into the stream and occupying, as the collision demonstrates, nearly one-third of the river's width, she sighted for the first time the defendant's vessels (Finding IX).

In this position and for want of time and space, after sighting the defendant's vessels, she was unable, as Finding XVI shows, to check her headway or straighten up her tow. The same finding shows that, "the width of her tow being 175 feet, the *Future City* could have passed between the said United States vessels and the New Orleans shore had there been sufficient time and space for her to check her headway and straighten up."

Beyond question, had she kept her place in the middle of the stream, the defendant's vessels would have been sighted much earlier than they were and the collision avoided.

When she rounded the bend in the river at the "Elevator," knowing that her view of the harbor would be obstructed until she passed *Celeste street*, even if the wind and rain did not obstruct the view, she should have gotten her tow under control—i. e., straightened it up and so kept it until she sighted the vessels in the harbor and thereby learned the situation, instead of floating down with the current in a "flanking position nearly at right angles to the current;" or

if she could not control her tow, as seems probable from the results, she should have broken it up at or prior to the time she reached the "Elevator," or if, as found, the *Atlanta* was only 650 feet from the New Orleans shore, certainly west of the current, and a strong current sweeps from the western to the eastern shore at the bend in the river at *Celeste street*, then the tow could have been pushed with the current to the center of the stream, or, if necessary, to the right or Algiers shore, and the collision thereby have been avoided.

For assuming, as the plaintiff contends, that for want of time and space, the master of the vessel could not have avoided the collision at the time it occurred, still this will not excuse him, if by timely measures of precaution the collision could have been avoided. (*The Syracuse* v. *Langley*, 12 Wall., 167; *The Vanderbilt* v. *McKibbon*, 6 Wall., 225; *Steward* v. *Teutonia*, 23 Wall., 77; *The Connecticut*, 103 U. S., 710.)

Certainly it would have been a timely measure of precaution for the *Future City* to have gotten her tow under control and straightened up after rounding the bend of the river at the "Elevator," or to have gone to the right or Algiers shore, or to have kept in the middle of the stream or divided her tow. In fact, to have entered the harbor in any other way than she did.

A steamer on entering a harbor is required to exercise great care and caution and with suitable and experienced lookouts actually and vigilantly employed in the performance of their duties, the want of which is enough to make a steamer on the Mississippi River liable for a collision. (*Culbertson* v. *The Southern Bell*, 18 How., 584; *The New York* v. *Rae*, 18 How., 223; *The Ottawa*, 3 Wall., 269; *Transportation Company* v.

Phila., etc., 22 How., 461; *Goslee* v. *Shute*, 18 How., 463.)

And the fact that the *Atlanta* could not be sighted until *Richard street* was reached imposed upon the master of the *Future City* additional care and caution in the handling of her tow, especially as against vessels at anchor.

The degree of care and caution to be exercised by the master of a steamer with a tow on entering a harbor should be measured, not only by its proximity to known danger, but by known difficulties in apprehending danger as well.

A custom which supersedes the exercise of reasonable care and caution is not reasonable, and should not be allowed to ripen into a rule of navigation.

Entering the harbor with a tow 175 feet in width and 607 feet in length, floating with the current, her tow flanking nearly at right angles to the current, in a stream only 1,800 feet in width, was certainly negligence on the part of the *Future City*, and it was by reason of such negligence that she was unable to control and straighten up her tow so as to make her landing in safety.

Having by her negligence, therefore, contributed to the collision, which resulted in the loss sustained, there can be no recovery, and the petition should be dismissed.

APPENDIX B.

IN THE UNITED STATES COURT OF CLAIMS.

BOSTON MARINE INSURANCE COMPANY, Western Assurance Company, The Greenwich Insurance Company, St. Paul Fire and Marine Insurance Company, and Citizens' Insurance Company of Missouri, claimants, *v.* THE UNITED STATES.	No. 18757.

PETITION.

Filed January 3, 1895.—J. R.

To the Honorable the Chief Justice and Judges of the Court of Claims:

The petition of the Boston Marine Insurance Company, the Western Assurance Company, The Greenwich Insurance Company, the St. Paul Fire and Marine Insurance Company, and the Citizens' Insurance Company of Missouri respectfully shows:

I.

1. That the claimants are the legal and equitable owners or claimants of the cargoes which, at the time hereinafter set forth, were laden upon barges in tow of the steam towboat *Future City*, and the advanced charges

on said cargoes, and make this their petition under an act of Congress approved August 3, 1894, and entitled "An act granting jurisdiction and authority to the Court of Claims in the case of the towboat *Future City*, her barges, cargoes, and so forth," a copy of which is hereunto annexed, marked "Exhibit A," and made part hereof.

2. The claimant, the Boston Marine Insurance Company, is a corporation duly incorporated under the laws of the State of Massachusetts and having its principal place of business in the city of Boston, in the said State; the claimant, the Western Insurance Company, is a corporation duly incorporated under the laws of the Dominion of Canada and having its principal place of business in the city of Toronto, in the said Dominion; the claimant, The Greenwich Insurance Company, is a corporation duly incorporated under the laws of the State of New York, and having its principal place of business in the city of New York, in the said State; the claimant, the St. Paul Fire and Marine Insurance Company, is a corporation duly incorporated under the laws of the State of Minnesota, and having its principal place of business in the city of St. Paul, in the said State; the claimant, the Citizens' Insurance Company of Missouri, is a corporation duly incorporated under the laws of the State of Missouri, and having its principal place of business in the city of St. Louis, in the said State. And at all times hereinafter mentioned the said claimants were underwriters and lawfully engaged in transacting the business of marine insurance.

II.

1. That on or about the 29th day of April, 1888, the George P. Plant Milling Company, Flanagan & Company, Wood-Maude Milling Company, Sparks Milling Company, Saxony Mills, Engelke & Feiner, Kauffman Milling Company, H. Miller & Company, Charles Hoppe & Son Malting Company, and F. H. Ryan & Son shipped in good order and condition on barge "73" of the St. Louis and Mississippi Valley Transportation Company, then lying at the port of St. Louis and bound for the port of New Orleans, divers goods and chattels, to be transported in the said barge to the said port of New Orleans, which said goods and chattels the agents of the St. Louis and Mississippi Valley Transportation Company did agree to transport to and deliver at the said port of New Orleans, by the said barge, in accordance with the consignments thereof.

2. That thereafter the claimants, the said Boston Marine Insurance Company, St. Paul Fire and Marine Insurance Company, Western Insurance Company, and the Greenwich Insurance Company, in the regular course of their business as marine insurers, issued to the said George P. Plant Milling Company, Flanagan & Company, Wood-Maude Milling Company, Sparks Milling Company, Saxony Mills, Engelke & Feiner, Kauffman Milling Company, H. Miller and Company, Charles Hoppe & Son Malting Company, and F. H. Ryan & Son, for and in consideration of the premiums paid, eleven (11) open-cargo policies of insurance, in sums aggregating the sum of forty thousand seven hundred and forty-one ($40,741) dollars, and in and by the said policies of insurance the claimants agreed to insure the said George P. Plant Milling Company, Flanagan & Company, Wood-Maude Milling Company, Sparks Milling

Company, Saxony Mills, Engelke & Feiner, Kauffman Milling Company, H. Miller & Company, Charles Hoppe & Son Malting Company, and F. H. Ryan & Son, as well in their own names and names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and cause them and each of such persons to be insured at and from the said port of St Louis to the said port of New Orleans, upon the said goods and chattels, against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortune that might come to the hurt, detriment, or damage of the said goods and chattels upon the said voyage; and the claimant, the said Boston Marine Insurance Company, in the regular course of its business as a marine insurer, issued to the St. Louis and Mississippi Valley Transportation Company, for and in consideration of the premiums paid, an open-cargo policy of insurance in the sum of one thousand and sixty-eight ($1,068) dollars, and in and by the said policy of insurance the said Boston Marine Insurance Company agreed to insure the said St. Louis and Mississippi Valley Transportation Company, as well in its own name and names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and cause it and each of such persons to be insured at and from the said port of St. Louis to the said port of New Orleans, upon advanced charges on shipments of property on said barge "73," against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortune that might come to the hurt, detriment, or damage of the said advanced charges upon the said voyage. All of which more fully appears from the bill of particulars hereunto annexed, marked "Exhibit B," and made a part hereof.

III.

1. That on or about the 29th day of April, 1888, Henry C. Haarstick, of the city of St. Louis, in the State of Missouri, shipped, in good order and condition, on barge "68," of the St. Louis and Mississippi Valley Transportation Company, then lying at the port of St. Louis and bound for the port of New Orleans, in the State of Louisiana, to be transported in the said barge to the said port of New Orleans, fifty-one thousand five hundred (51,500) bushels of wheat, which said wheat the agents of the St. Louis and Mississippi Valley Transportation Company did agree to transport to and deliver at the said port of New Orleans, by the said barge, to the order of the shipper.

2. That thereafter the claimant, the said Boston Marine Insurance Company, in the regular course of its business as marine insurer, issued to the said Henry C. Haarstick, for and in consideration of the premiums paid, an open-cargo policy of insurance in the sum of forty-eight thousand seven hundred and nineteen ($48,719.00) dollars, and in and by the said policy of insurance the said Boston Marine Insurance Company agreed to insure the said Henry C. Haarstick, as well in his own name and the names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and did cause him and each of such persons to be insured at and from the said port of St. Louis to the said port of New Orleans, upon the said wheat, against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortune that might come to the hurt, detriment, or damage of said wheat upon the said voyage.

IV.

1. That on or about the 29th day of April, 1888, the Wood-Maude Milling Company, Flanagan and Company, E. O. Stanard Milling Company, and Engelke and Feiner shipped, in good order and condition, on barge "50," of the St. Louis and Mississippi Valley Transportation Company, then lying at the port of St. Louis and bound for the port of New Orleans, divers goods and chattels, to be transported in the said barge to the said port of New Orleans, which said goods and chattels the agents of the said St. Louis and Mississippi Valley Transportation Company did agree to transport to and deliver at the said port of New Orleans, by the said barge, in accordance with the consignments thereof.

2. That thereafter the claimants, the said Citizens' Insurance Company of Missouri, Western Assurance Company, and The Greenwich Insurance Company, in the regular course of their business as marine insurers, issued to the said Wood-Maude Milling Company, Flanagan and Company, E. O. Stanard Milling Company, and Engelke and Feiner, for and in consideration of the premiums paid, four (4) open-cargo policies of insurance, in sums aggregating the sum of nine thousand one hundred and fifty-seven ($9,157.00) dollars, and in and by the said policies of insurance the said Western Assurance Company, Citizens' Insurance Company of Missouri, and The Greenwich Insurance Company agreed to insure the said Wood-Maude Milling Company, Flanagan and Company, E. O Stanard Milling Company, and Engelke and Feiner, as well in their own names and names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and cause them and each of

such persons to be insured at and from the said port of St. Louis to the said port of New Orleans, upon the said goods and chattels, against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortune that might come to the hurt, detriment, or damage of the said goods and chattels upon the said voyage. All of which more fully appears from the bill of particulars hereunto annexed, marked Exhibit C, and made part hereof.

V.

1. That on the 29th day of April, 1888, the said towboat *Future City*, with barges "25," "73," "50," "43," and "37" in tow, sailed from St. Louis, bound for New Orleans, and on arrival at the port of Cairo, Illinois, the following day (April 30th), added to the said tow barges "66," "67," and "68," the said barges "68," "73," and "50" being laden with wheat and other goods and chattels, as aforesaid. The *Future City* then proceeded with her tow, nothing worthy of note occurring until on the 7th day of May, 1888, about 1 o'clock p. m., while descending the Mississippi River and proceeding toward the portion of the public wharf which the said city of New Orleans had set apart as a mooring place for the claimant's vessels. The said towboat and barges were staunch, sound, and seaworthy, and the former was fully manned, officered, and equipped, and in every way fit for the services in which she was engaged, and was amply powerful and able to handle and manage her said tow. The said towboat, at the proper point, made the preparations which, in the usual course, were necessary for a descending towboat, in order that she and her tow might make her said mooring place in accordance with the ordinances of the said city. While

she was so engaged she encountered a severe storm of wind and rain, the rain making it impossible for her pilot or her officers to make out objects ahead of them. When the rain accompanying the storm had passed over the said towboat was found to be in a proper position from which to make her said mooring place, with her tow, in safety. Her pilot, officers, and crew then, for the first time, discovered the United States vessels of war *Atlanta*, *Galena*, *Ossipee*, *Yantic*, and *Richmond* lying at anchor, directly in the proper track of all vessels descending the Mississippi River and bound for the city of New Orleans. The said *Atlanta* was then distant from the said towboat about one hundred and fifty yards, and the said *Galena*, *Ossipee*, *Yantic*, and *Richmond* were below her in the river, in the order named, at intervals of about seven hundred feet, and at distances varying from four hundred to six hundred and fifty feet from the New Orleans shore of the river. The said towboat, her pilot, officers, and crew made every effort possible and pursued the only course feasible to prevent a collision with the said vessels of war, but owing to the narrowness of the space between the said *Atlanta* and the New Orleans shore of the river, and in spite of the efforts of the said towboat, her pilot, officers, and crew, to prevent it, the said barge "73" came into collision with the said *Atlanta* and was thereby cut down, and, as a result thereof, her said cargo and advanced charges thereon, which were of the value of forty-one thousand and sixty-six dollars and fifty cents ($41,066.50), sustained loss and damage to the amount of twenty-nine thousand five hundred and fifty-one dollars and twelve cents ($29,551.12). Thereafter, and in spite of the continued efforts of the said towboat, her pilot, officers, and crew, to prevent it, the said barge

"68" came into collision with the said *Galena* and, as a result thereof, sank immediately, and her said cargo, which was of the value of forty-eight thousand seven hundred and nineteen ($48,719) dollars, became a total loss, and thereupon all the fastenings of the said tow were parted and greatly damaged, and the said tow was broken up and the rigging of the said towboat was greatly damaged, so that she could no longer control the said barges, and the said barge "50" drifted down upon the said *Richmond*, and was thereby greatly damaged, and, as a result thereof, her said cargo, which was of the value of seven thousand and seventy-two dollars and fifty cents ($7,072.50), sustained loss and damage to the amount of ninety-eight dollars and sixty-eight cents ($98.68).

2. That the said vessels of war were lying at anchor in unusual and improper positions, whereby they rendered the navigation of the Mississippi River at that point extremely dangerous, if not impossible, for towboats and tows descending the said river and bound for New Orleans. There were, at the times aforesaid, suitable and proper anchorage grounds near the shore opposite to the city of New Orleans, and lower down the river, where it was customary for all merchant vessels to lie at anchor, and where the said vessels of war could have anchored conveniently, and with entire safety to them, and where they, while lying at anchor, would not have interfered with the navigation of the said river, or rendered the same dangerous. The said vessels of war came to anchor in their said positions on the 5th of May, 1888, and the officers, pilot, and crew of the said towboat had no means of knowing or being informed, and did not know, of their position before they were discovered as aforesaid, after which

there was not sufficient time and space to prevent the said collisions. The said collisions and injury and loss resulting therefrom was solely and directly the result of negligence on the part of those in charge of the said vessels of war.

VI.

That by reason of the premises and the collisions aforesaid, and the resultant loss of and damage to the said wheat, goods, and chattels, and advanced charges thereon, the claimants, as insurers as aforesaid, became liable to pay and have paid to the said George P. Plant Milling Company, Flanagan and Company, Wood-Maude Milling Company, Sparks Milling Company, Saxony Mills, Engelke and Feiner, Kauffman Milling Company, H. Miller and Company, Charles Hoppe and Son Malting Company, F. H. Ryan & Son, St. Louis and Mississippi Valley Transportation Company, Henry C. Haarstick and E. O. Stanard Milling Company, for the loss of and damage to the said wheat, goods, chattels, and advanced charges as aforesaid, the sum of seventy-eight thousand three hundred and sixty-eight dollars and eighty cents ($78,368.80), which said sum is equal to or less than the value of the property insured and lost or damaged as aforesaid, all of which more fully appears from the bill of particulars hereunto annexed, marked Exhibit D, and made part hereof.

VII.

That by reason of the premises and the payments aforesaid the claimants have sustained damage in the following sums:

Boston Marine Insurance Company	$52,120.90
Western Assurance Company	23,580.60

The Greenwich Insurance Company	$1,739.30
St. Paul Fire and Marine Insurance Company	860.00
Citizens' Insurance Company of Missouri	68.00
Total	78,368.80

And that no part of the said sums has been paid to the claimants by the defendant.

VIII.

That the claimants are the only persons owning or interested in the claim above set forth, and no assignment or transfer of the said claim or any part thereof or interest therein has been made; that the claimants are justly entitled to receive from the United States seventy-eight thousand three hundred and sixty-eight dollars and eighty cents ($78,368.80), after allowing all just credits and offsets; that the claimants have always borne true allegiance to the Government of the United States, and have not in any way aided, abetted, or given encouragement to rebellion against the said Government, and that the claimants believe the facts hereinbefore stated to be true.

Wherefore the claimants pray for judgments against the United States in the sums next hereinafter set forth:

Boston Marine Insurance Company	$52,120.90
Western Assurance Company	23,580.60
The Greenwich Insurance Company	1,739.30
St. Paul Fire and Marine Insurance Company	860.00
Citizens' Insurance Company of Missouri	68.00
Amounting in all to the sum of seventy-eight thousand three hundred and sixty-eight dollars and eighty cents	78,368.80

And for such further relief as this honorable court may

be entitled to grant at law, in equity, or in admiralty in the premises.

[SEAL.] THE BOSTON MARINE INSURANCE CO.,
By C. A. FULLER, *Vice-President.*

[SEAL.] THE WESTERN ASSURANCE CO.,
By J. J. KENNY, *Managing Director.*

[SEAL.] THE GREENWICH INSURANCE CO.,
By M. A. STONE, *President.*
W. B. WARD, *Asst. Secretary.*

[SEAL.] ST. PAUL F. & M. INS. CO.,
By A. W. PERRY, *Secy.*

JOS. K. MCCAMMON,
JAMES H. HAYDEN,
Attorneys for Claimant.

STATE OF MASS., *County of Suffolk, ss:*

Charles A. Fuller, being duly sworn, deposes and says that he is vice-president of the Boston Marine Insurance Company, one of the claimants named in and who signed the foregoing petition; that he has read the same and knows the contents thereof, and that he believes the facts stated therein to be true.

CHARLES A. FULLER.

Subscribed and sworn to before me this 22d day of November, A. D. 1894.

[SEAL.] THOS. H. LORD,
Notary Public.

James J. Kenny, of the city of Toronto, county of York, Province of Ontario, being duly sworn, deposes and says that he is managing director of the Western Assurance Company, one of the claimants named in and who signed the foregoing petition; that he has read the same and knows the contents thereof, and that he believes the facts stated therein to be true.

J. J. KENNY.

Subscribed and sworn to before me this 28th day of November, A. D. 1894.

[SEAL.] A. R. CREELMAN,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

M. A. Stone, being duly sworn, deposes and says that he is president of the Greenwich Insurance Company, one of the claimants named in and who signed the foregoing petition; that he has read the same and knows the contents thereof, and that he believes the facts stated therein to be true.

M. A. STONE,
President.

Subscribed and sworn to before me this 21st day of November, A. D. 1894.

WM. B. STUYVESANT,
Notary Public, Kings Co. Certificate filed N. Y. Co.

STATE OF MINNESOTA,
County of Ramsey, ss:

A. W. Perry, being duly sworn, deposes and says that he is secretary of the St. Paul Fire and Marine Insurance Company, one of the claimants named in and who signed the foregoing petition; that he has read the same and knows the contents thereof, and that he believes the facts stated therein to be true.

A. W. PERRY.

Subscribed and sworn to before me this 24th day of November, A. D. 1894.

[SEAL.] W. J. SONNEN,
Notary Public, Ramsey County, Minn.

Exhibit A.

An act granting jurisdiction and authority to the Court of Claims in the case of the towboat *Future City*, her barges, cargoes, and so forth.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the legal or equitable owners or claimants of the steam towboat *Future City*, her barges in tow, cargoes thereon, freight, and personal effects contained in them, alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war *Atlanta*, *Galena*, and *Richmond*, in the Mississippi River, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war.

Approved, August 3, 1894.

Exhibit B.

Statement showing insurance effected on barge "73," the respective owners of the cargo thereon, and the several amounts for which they were respectively insured:

Name of insurer.	Name of insured.	Amount of insurance.
St. Paul Fire and Marine Insurance Company.	George P. Plant Milling Company	$1,545.00
Western Assurance Company	Flanagan Company	462.00
Western Assurance Company	Wood-Maude Milling Company	2,798.00
Boston Marine Insurance Company.	Sparks Milling Company	2,820.00
Boston Marine Insurance Company.	Saxony Mills	2,611.00
The Greenwich Insurance Company.	Engelke & Feiner *a*	2,475.00
Boston Marine Insurance Company.	Kauffman Milling Company	410.00
Boston Marine Insurance Company.	H. Miller & Company	2,725.00
Western Assurance Company	Charles Hoppe & Son Malting Company	2,865.00
Western Assurance Company	F. H. Ryan & Son	9,090.00
Western Assurance Company	F. H. Ryan & Son	12,940.00
Boston Marine Insurance Company.	St. Louis and Mississippi Valley Transportation Co.	1,068.00
Total		41,809.00

a The policy of insurance issued by the Greenwich Insurance Company to Engelke & Feiner included cargo shipped by them on barges "73," "50," and "25," distributed and valued as follows:

Barge 73, 630 bbls., valued at	$1,732.50
" 50, 142 " "	390.50
" 25, 128 " "	352.00
	2,475.00

Exhibit C.

Statement showing insurance effected on cargo laden on barge "50," the respective owners of said cargo, and the several amounts for which they were respectively insured:

Name of insurer.	Name of insured.	Amount of insurance.
Western Assurance Company	Wood-Maude Milling Company	$2,798.00
Western Assurance Company	Flanagan & Company	137.00
Citizens' Insurance Company of Missouri.	E. O. Stanard Milling Company	3,477.00
The Greenwich Insurance Company.	Engelke & Feiner *a*	2,745.00
Total		9,157.00

a See Exhibit B, note *a*.

EXHIBIT D.

Statement showing payments made by and net losses of claimants on account of insurance on barges "73," "68," and "50."

Dates of payments and names of insurance companies by whom payments made.		To whom payments made.	No. of barge upon which ins. is effected.	Amount of payments made.	
Date.	Name of insurance company.			Amount of each payment.	Total amount of payments made by each company.
1888.					
May 24	Boston Marine Insurance Co.	Sparks Milling Co	73	$1,052.50	
May 24	Boston Marine Insurance Co.	Saxony Mills	73	1,008.40	
May 24	Boston Marine Insurance Co.	Kauffman Milling Co	73	246.00	
May 28	Boston Marine Insurance Co.	H. Miller & Co	73	1,080.75	
Aug. 4	Boston Marine Insurance Co.	St. Louis & Mississippi Valley Transportation Co.	73	13.75	
June 25	Boston Marine Insurance Co.	Henry C. Haarstick	68	18,719.00	$52,120.90
June 12	Western Assurance Co.	Flanagan & Co	73	462.00	
June 12	Western Assurance Co.	Wood-Maude Milling Co.	73	1,430.00	
June 12	Western Assurance Co.	Wood-Maude Milling Co.	50	6.38	
July 21	Western Assurance Co.	Chas. Hoppe & Son Malting Co.	73	962.50	
June 12	Western Assurance Co.	F. H. Ryan & Son	73	20,702.22	
June 12	Western Assurance Co.	Flanagan & Co	50	17.50	23,580.60
May 29	The Greenwich Insurance Co.	Engelke & Feiner	73	1,732.50	
May 29	The Greenwich Insurance Co.	Engelke & Feiner	50	6.80	1,739.30
May 24	St. Paul Fire & Ma. Ins. Co.	George P. Plant Milling Co.	73	860.00	860.00
	Citizens' Insurance Co. of Missouri.	E. O. Stanard Milling Co.	50	68.00	68.00
	Total				78,368.80

I hereby certify that the foregoing paper is a full and complete copy of the petition of the claimants in the case of the *Boston Marine Insurance Company et al.* v. *The United States*, No. 18757, on file in this court, which said action is now pending in this court and undetermined.

[SEAL.] JOHN RANDOLPH,

Assistant Clerk of the Court of Claims.

OCTOBER 30, 1901.

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